THE SOUTHWESTERN POLITICAL AND SOCIAL SCIENCE QUARTERLY

VOL. IV DECEMBER, 1923 No. 3

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PUBLISHED QUARTERLY BY
THE SOUTHWESTERN POLITICAL AND SOCIAL SCIENCE ASSOCIATION
AUSTIN, TEXAS

"Entered as second-class matter January 10, 1921, at the postoffice at Austin, Texas, under the Act of March 3, 1879."

[illegible] Social Science

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THE CONTENTS OF STATE CONSTITUTIONS[1]

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The first observation to be made in connection with the contents of State Constitutions is that it is not a matter of supreme importance what the contents are, or for that matter whether we have a written constitution at all or not. England gets along pretty well without a clearly defined, written constitution.

Our troubles are not the result of defective organization. It matters not a great deal, as James Harvey Robinson[2] has recently reminded us, whether we divide responsibility or concentrate it, whether we lengthen or shorten the term of office of government officials, or pay them more or less, whether we increase or decrease the number of members in government bodies, whether we nominate candidates by the convention system or the primary, whether we adopt the initiative, referendum, and recall, and government by commission. While organization is essential, the importance of its form has been exaggerated, as has the place of constitutions in the life of the American people. Under any form corruption and efficiency may flourish, while countries

[1]Paper read at the annual meeting of the Southwestern Political Science Association, Dallas, Texas, April 3, 1923.

[2]*The Mind in the Making*, 1921, pp. 15-16.

to the south of us, with excellent constitutions, modeled on our own, have found in their possession no guarantee of personal liberty and good government.

Of course every state must have a constitution, just as every biological organism, every plant and animal, has a constitution. In most modern states some effort has been made to describe the constitution, to put in written form that which is supposed to be the fundamental organization of the state. The constitution does not reate the state, or, strictly speaking, the state the constitution; bu the constitution comes into existence with the state itself, the written instrument being the formal expression or outward formulation of the inner constitution. It is only in comparatively recent years that it has been common for states to put certain of these fundamental or constitutional principles into written documents. In practically all modern states the constitution is partly written and partly unwritten. England has her Magna Charta, Bill of Rights, Act of Settlement, and more recent documents, but her Cabinet, annual sessions of Parliament, division into two Houses, the exclusive power of the House of Commons to initiate revenue bills, and other important matters, are regulated wholly by custom. The American Constitution says nothing about the President's Cabinet, political parties, and other matters really pertaining to the fundamental organization of the state.

The subject assigned me contemplates the popular American usage: the constitution is the body of fundamental laws and principles according to which the state is objectively organized, as expressed in a written instrument. It will be well to keep in mind, however, that the written constitution does not tell the whole story; that if it has been in existence for some time it has become overlaid with custom and judicial interpretation, as, for example, our Federal Constitution has been greatly modified by precedent and expanded by judicial interpretation. Indeed, in the United States the judiciary plays a remarkable and exceptional role, assuming the right both to interpret the meaning of

the provisions of the constitution and to declare statutes it deems in conflict with it of no force and effect. This assumes that the judgment of the court is superior to that of the legislative body, though the members of the latter take the oath to support the constitution as well as do the judges. Most other nations do not give one department of government the power to declare acts of another department of no avail. For example, an English Act of Parliament cannot be declared unconstitutional, for Parliament is the judge of constitutionality; likewise the French constitution is dependent for its interpretation on the legislature, though there is now in France a movement to adopt the American method.[3] It seems that we Americans would rather trust the judiciary as interpreter of fundamental principles than the legislature. This supremacy of the judiciary in the United States indicates distrust of legislative power.

We see than that the constitution of a state grows with the growth of the state. This is the English conception. It has been pointed out[4] that the French are more inclined to think of a constitution as made and not evolved—struck off at once and fitted to the nation like a suit of clothes. A constitution is a philosophical instrument, a work of art and logic, in which principles occupy the important place, so that everything must conform to a principle or be deduced from it. Over against that view we are told[5] that it is a fallacy to think that "a nation may cut loose entirely from its past and erect a new constitutional structure better adapted to the needs of the people than any which is the product of growth and evolution." Yet some nations have done so; witness Russia. We think also, of course, of the French Revolution. The nation, like the individual, may be born again, may be converted, and change its whole course of life.

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[3]C. G. Haines, *Ministerial Responsibility Versus the Separation of Powers*, in the American Political Science Review, Vol. XVI, No. 2, May, 1922, pp. 196, 197.

[4]J. W. Garner, *Introduction to Political Science*, 1910, p. 386.

[5]*Ibid.*, p. 387.

A written constitution, according to the American idea, usually contains three parts or sets of provisions. The first is the Bill of Rights, affirming the fundamental rights of citizens. One of the chief objections to the ratification of the Federal Constitution was the absence of a Bill of Rights. Inasmuch as the national government is one of specifically enumerated powers, the question has been raised as to why there need by a declaration of abstract rights. But the first ten Amendments adopted in 1791 supplied the alleged need. We Americans have always attached importance to the Bill of Rights as a necessary part of a constitution, and every state constitution adopted since 1780 has given a prominent place to the Bill of Rights with the exception of the constitutions of Louisiana of 1812, 1845, 1852, and 1864, even here the rights of individuals being by no means ignored. Originally these declarations were intended to protect the people against arbitrary executive power, and certain foreign critics have asked why we should continue to repeat and multiply them in our constitutions when there is no longer danger from that quarter. They suppose it is American fondness for enumerating principles of government and maxims of political liberty, but Jefferson feared both executive and legislative domination, and some think that the danger from legislative interference has increased.[6]

In seven of the original state constitutions the Bill of Rights precedes the part dealing with the actual frame of government, the states in question being New Hampshire, Vermont, Massachusetts, Pennsylvania, Maryland, Virginia, and North Carolina. These documents repeat the principles of the Magna Charta and the English Bill of Rights concerning property, general warrants, trials, excessive bail, unusual punishments, freedom of the press, etc.; also, of course, the doctrine of natural rights, enunciated by Locke and the French philosophers, popularized in America by Henry, Jefferson, and others, and embodied in the Declaration of Independence. The form is mainly that of John Adams.

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[6] *Ibid.*, p. 398.

Until recently some of us may have been inclined to regard the enunciation of these principles as having only historical value and interest, but here in Texas, as elsewhere, during the past year we have been engaged in long and heated controversy regarding some of these essentials —the right to worship God according to the dictates of one's conscience, the absence of a religious test for holding public office, the right of trial by jury, and the right to confront one's accusers, employ counsel, appeal, etc., and the prohibition of cruel and unusual punishment (now also the provision against search and seizure). We have had the spectacle of a State Democratic Convention refusing to go on record in endorsation of the Declaration of Independence, the Constitution of the United States, and the Texas Bill of Rights; or, to speak more accurately, perhaps, the politicians controlling the convention, using every device of parliamentary tactics and steam-roller methods, would not permit such declarations to come before the convention is clear, unambiguous form, unmixed with other issues, though strenuous effort was made to that end both in committee and on the convention floor.

Outside of America, nations have rarely felt the need of a Bill of Rights in their constitutions. James Bryce[7] said that our declarations of rights are *historically* the most interesting part of our American constitutions, being "the legitimate child and representative of the Magna Charta and the English Bill of Rights." Useful as may have been these declarations when they were first enunciated, and valuable as are most of the principles set forth even today, some of the statements, especially as interpreted by the courts, are obstacles to growth and progress; for example, the value of the rigid jury system may be called in question.

The second group of provisions outlines the organization of the government, distributing its powers, and defining the electorate. As regards content and scope our Federal Constitution has been rightly regarded as the model of written constitutions, its provisions being only those that are in-

[7] *The American Commonwealth*, I, p. 438 (1910 Ed.).

dispensable. The frame of government is set forth in general, yet sufficiently detailed, terms. Provision is made for the distribution of the powers of government between the legislative, executive, and judicial departments and for the organization, in a general way, of each. There are few miscellaneous provisions, and there is little or nothing regarding trade, industry, banks, corporations, schools, and even army and navy. It has well been pronounced a model of brevity, conciseness, and logical arrangement, the language being free from redundant and ambiguous phrases, with few exceptions, one being the vague and redundant reference to the judiciary. The framework has been seldom altered, though, as we have already seen, the actual working has been greatly changed and is still being changed.

The first state constitutions, those adopted before the close of the eighteenth century, were brief and general in character, but they have now ceased to be simply instruments of fundamental public law, and are in part codes of ordinary statute law. The New Hampshire Constitution of 1776 contained only 600 words. The Virginia Constitution was a document of a few pages containing 1500 words, but now it has 75 pages and over 30,000 words. A lengthy article on the government of cities in the Virginia document is said to be almost as elaborate as a municipal corporation act. The Constitution of Alabama contains about 33,000 words, that of Louisiana 44,000, and Oklahoma 50,000. The Constitution of Oklahoma gives, for example, a detailed enumeration of those who may accept railroad passes. The Constitution of Colorado requires 85 pages of close print. The Texas Constitution is of about 26,000 words.

The distinction between constitutional law and statute law is said to be the fundamental principle of American constitutional development. It goes back to Aristotle, who distinguished between customary, universal law, violation of which was punishable by death, and ordinary, conventional law; and is continued in the Roman *lex summa* and *lex scripta*, and the English common law and statute law. This departure on the part of the states of the Union from

constitutional principles and from their own early practice finds explanation, if not justification, in two considerations.

In the first place, since the early constitutions were formed, great changes have taken place in our economic and social life. Ours is a complex society. Note the transition from an agricultural to an industrial society with all the problems of modern industrialism, especially industrial combinations and aggregations of capital, the massing of the people in centers and the growth of cities with the problems of urban life, the development of new agencies of transportation and communication, notably the railway, the telegraph and telephone, and now the airship and radio. Connected with this transformation is another change more fundamental, and that is the new attitude of the people toward the government found in a changed conception of the proper functions of the state. The prevailing political philosophy when our constitutions were first drawn up taught that the government had a few primary functions: the protection of life and property, the maintenance of order, the conduct of foreign relations, and the operation of such indispensable paternalistic enterprises as the postal system, which latter invasion of private enterprise, while perhaps regrettable on abstract grounds, was practically necessary. The least government the best, was the slogan. Now the state is looked upon as an instrument of public welfare, an agency through which all matters affecting general well-being may be handled. It is now the obligation of the state not only to protect the liberties of the individual as such, but also and chiefly to promote the social welfare, to bring about equality of opportunity and a more equitable distribution of wealth and income. Certainly this change has not come without most vigorous protest. The favorite theme of the older statesmen is this departure from the principles of the fathers: the error of looking to the government to do for us what we should do for ourselves, the degeneracy of the times in the ever-increasing extension of the functions of government and the consequent increase in taxation, and the like. But the remarkable fact is that while no one is

found to dispute these pronouncements, no one seems to take them very seriously, or to think they need answering, and we go on in our mad rush toward socialism and other dire evils.

There is a second reason why our modern state constitutions are not content to stick to fundamentals, and that is found in the popular district of government. The first state constitutions were emergency documents; in some instances, as we have seen, giving a short Bill of Rights, and then outlining the framework of government. Colonial experience had inculcated the danger of a too powerful executive. Hence provision was made to protect the state against the power of the executive, while the power of the legislature was magnified. In New England and New York the governor was elected by the voters, but elsewhere by legislatures. There is now, however, popular distrust of the legislature, as well as of the executive, expressed in constitutional restrictions on its power. As early as 1857 a jugde declared that the purpose of a constitution was not to grant but to confine and restrain power. We are not willing to leave to legislative control matters that fall in that province, because legislative bodies do not seem competent to deal with many of these questions.

I do not believe that either the first or the second of the reasons given justifies our states in their subverting the very character of a constitution. Our Federal Constitution contains only about 4,000 words without the Amendments, and 5,000 with the Amendments, but has served its purpose admirably through the economic and social changes of the years. A detailed constitution is soon outgrown. Its provisions become obsolete. An illustration is found in the inadequate time allowed our Texas legislators under present conditions.[8] On March 9th of this year their pay began at

[8] "The members of the Legislature shall receive from the public treasury such compensation for their services as may, from time to time be provided by law, not exceeding five dollars per day for the first sixty days of each session; and after that not exceeding two dollars per day for the remainder of the session." *Texas Constitution*, Art. III, Sec. 24.

two dollars a day instead of five. Three days more of the regular session would have cleared the calendar, it is said, and have saved some important measures. In 1876, when the present constitution was adopted, there were three hundred bills introduced, now there are 1200. Then the amount appropriated for two years was $1,500,000, now it is $40,000,000. If an effort is made to compress the principles of the political life and growth of a people for an indefinite period of time into a single document, it must not be like fitting a suit of clothes with no consideration for change in size,[9] but it must be in general, even universal, terms that will have validity whatever may be the development of the people, allowing, however, as we shall see in a moment, for constitutional changes to be made by the sovereign people themselves at their discretion. As for the second reason, distrust of the legislative body, that strikes at the very foundations of representative government.[10] It is only natural that legislatures should deteriorate when you expect little of them, when matters of importance are removed from their jurisdiction.

The third part of a constitution is provision for amendment. Curiously this is sometimes absent. Eight state constitutions of the eighteenth century contained no such provision, but all framed since the beginning of the nineteenth century have contained amending provisions, except the Virginia Constitutions of 1830, 1851, and 1864. England having never reduced her constitution to a single written

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[9]Garner, *op. cit.*, p. 394.

[10]Haines, *op. cit.*, p. 209. "But mere palliatives such as the making of the budget by the president and his cabinet, and the combination of executive and legislative powers largely in the same hands, though they may improve the working of existing governmental machinery will only tend to call attention anew to certain obvious facts, namely, that modern representative assemblies are failing in the performance of some of their most important functions, that the present bodies must be radically changed or give way to other forms of political organization, and that the contest to secure and retain representative and responsible governments will require as in past generations constant vigilance and increased interest on the part of political thinkers."

document, Parliament is a sovereign body capable of exercising constitutional authority. The Italian Constitution (Statuto) is presumably alterable by the ordinary processes of legislation, and the same is true of the Constitution of Spain. Our first state constitutions were framed by revolutionary bodies, either conventions or legislatures, and of fourteen adopted between 1776 and 1783 only two were formally submitted to the people for ratification, that of Massachusetts in 1776 and that of New Hampshire in 1783. During the Revolution, of course, such submission was not practicable. Pennsylvania and Vermont provided for a council of censors to inquire whether the constitution had been observed, and, by a two-thirds vote, to call for a convention to revise or amend the constitution. The result was a conflict between the censors and the legislature, the censors being very conservative. New York had a council of revision.

There are of course two interests to conserve: stability and flexibility. The provision for amendment must be neither so rigid as to make needed changes too difficult, nor so flexible as to encourage frequent and unnecessary change. The constitution guarantees both order and progress. The provision for amendment is a safety valve. Inelasticity breeds disrespect and revolution.

A constitutional convention is demanded only if there is that state of mind that calls for a true revision, an open-minded attitude like that of those who drafted the first constitutions. Doubtless there could conceivably be gathered together a group, most probably a very small group, who might give us here in Texas, for example, a much better instrument for our purposes than we have today, but the probability of anything being produced differing essentially from what we now have is slight, and, should it deviate from the familiar paths, it would be rejected by the people. Most of the constitutional amendments proposed by the members of our Texas legislature at the recent session were of relatively small importance. There are of course some glaring defects in our present Texas constitution, such as the limita-

tion on the salaries of governor,[11] other state officers, and judges, but no convention is needed for the removal of these obstacles to efficient government; the people may rectify the situation by amendment to the constitution at any time they see fit, which thing they have steadfastly refused to do. There are, however, more serious matters worthy of consideration. No genuine tax reform is possible till the constitutional provision requiring equality, uniformity, and proportionateness in property taxation is changed.[12] Some years ago the city of Houston, under the leadership of Pastoriza, adopted and successfully operated for a short time a system of encouraging building and improvements by relieving them of the main burden of taxation, letting the tax rest most heavily on land, but it was declared unconstitutional. Defects with reference to both taxation and organization hamper educational progress.

Our doctrine of the separation of powers, with checks and balances, may profitably be subjected to re-examination. Following Montesquieu, President Madison said that "The accumulation of all powers, legislative, executive, and judicial, in the same hands, may justly be pronounced the very definition of tyranny." There are those, however, who find in this system the prime cause of the evils of partisan politics and, indeed, political corruption; in place of simplicity, directness, and responsibility we have confusion, indirectness, and irresponsibility.[13] The lack of concentration in administration and the absence of definite location of responsibility have been overcome in city government in

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[11]"He shall, at stated times, receive as compensation for his services an annual salary of four thousand dollars, and no more, and shall have the use and occupation of the Governor's mansion, fixtures, and furniture." *Texas Constitution*, Art. IV, Sec. 5.

[12]"Taxation shall be equal and uniform. All property in this State, whether owned by natural persons or corporations, other than municipal, shall be taxed in proportion to its value, which shall be ascertained as may be provided by law." *Texas Constitution*, Art. VIII, Sec. 1.

[13]C. G. and B. M. Haines, *Principles and Problems of Government*. 1921, p. 219 ff.

part by the adoption of the commission form and city-manager type. This much-lauded doctrine of watertight compartments, which, indeed, do not exist, as there is overlapping at several points, has been an obstacle to efficient government.[14] Many a good proposal has been thrown out because it did not conform to the theory of separation of powers. It will be noted that the barriers are constructed partly by the judges as well as found in the constitution itself.

Some thinkers, especially among the French, recognize but two powers: that which makes the law and that which executes it (*la puissance législative* and *la puissance exécutive.)* In this view the judicial function does not constitute a separate and distinct power, but is part of the executive power, or an incident of it, concerned with the application and enforcement of the executive will. So for certain

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[14]Haines, *op. cit.*, p. 207. "In the light of these principles the American theory of the separation of powers appears largely as a device for a policy of inaction—an excellent plan to encourage politicians to escape responsibility and to permit private individuals and corporate organizations to defy public powers with impunity. In the words of a caustic foreign critic, if the desire is to secure an effective check on radical and progressive movements, if the intention is to place corporate organizations in an impregnable position so far as government regulation is concerned, the American theory of the separation of powers is undoubtedly a well-conceived device for this purpose. From the standpoint of responsible and efficient government, the separation of powers stands as an obstacle which must be removed if the government of the United States is to make progress along governmental lines and is to be prepared to meet conditions both domestic and foreign."

While the foregoing was written primarily with reference to the Federal Government, it applies probably with even greater force to that of the states. Article II of the Texas Constitution reads: "The powers of the government of the State of Texas shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to-wit: Those which are legislative to one, those which are executive to another, and those which are judicial to another; and no person, or collection of persons being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted."

German thinkers there are simply *Verfassung*, the expression of the will of the states, and *Verwaltung*, the execution of the state will. President Hadley has said that the real division of powers in the modern state is not into the legislative, executive, and judicial powers, but that the forces of democracy, divided between the executive and the legislative, are set over against the forces of property, with the judiciary as protector.[15]

None of the first state constitutions gave the courts power to declare an act of the legislature unconstitutional, and to this day in two hundred constitutions, that of Georgia is said to be the only one that confers this right. In Massachusetts the legislature might consult the judges. But the judges claimed the power of upholding the constitution against the legislature as early as 1778 in Virginia and two years later in New Jersey. At the basis of this power of the courts is, according to Hamilton, the principle that sovereignty rested with the people, but it is in behalf of the people for protection against the courts, which, it is charged, have become far removed from the people, that demands are being made for relief from the supremacy and domination of the judiciary.[16]

Another question that may be raised is as to the utility of our bicameral system. Historically it had its rise in the need of representation by two distinct classes—the lords

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[15]The word used by President Hadley is "arbiter," but his meaning is made clearer in this connection by the word "protector." His views were originally set forth in a lecture at the University of Berlin, which was published in *The Independent* of April 16, 1908, Vol. LXIV, pp. 834-838, under the title, *The Constitutional Position of Property in America*. Substantially the same appears again in subsequent lectures, and constitutes Chapter II of his book: *Undercurrents of American Politics*, 1915. He attempts to show that the rights of property are more strongly protected in our country under the Constitution as interpreted by the courts than in any European country.

[16]Reference is here made to the recent propositions of Senators LaFollette and Borah looking toward restricting the power of the Supreme Court to declare acts of Congress unconstitutional.

and the people in England[17]: but with us both houses represent the same general element, chosen in the same way, and another excuse must be found for its perpetuation. Accordingly, we are told that one house acts as a check on the other, and an added check is provided in the executive veto. All our states originally adopted a bicameral legislature except Pennsylvania, which also had an executive council instead of a governor, but she changed to the usual type in 1790. Here in Texas we might get much better service from a single house of small membership, but well paid. The danger of unwise and extreme action by such a body may be offset by the added sense of responsibility of its members, as well as by the prior care of voters in choosing their representatives. All the provinces of Canada except Quebec, corresponding to our states, have the unicameral system.

But at present it would be difficult to secure serious consideration for such proposals. Those who have the ear of the public are given to counsels on the wisdom of the fathers, the virtual inspiration, inerrancy, and necessarily static character of our constitutions, Federal and state, with which is contrasted the degeneracy of our times. An eminent Texas jurist has recently written as follows: "In other words, it will be found that there is no greater necessity for a change in the constitution than there is for a change in the decalogue or the announcements made in the Sermon on the Mount. Of course, there are persons who believe that the Decalogue should be revised, and the Sermon on the Mount should be rewritten, but the majority of our people, I conclude, are satisfied with the time-honored wisdom announced in these declarations, and I bespeak for the principles announced in the present constitution a similar consideration."

As long as we are under the hypnotic and inhibitive spell of catchwords, such as communist, socialist, bolshevist, radical, which are used as a cheap and easy substitute for

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[17]W. F. Willoughby, *The Government of Modern States*, 1919, p. 314 ff.

thought and argument, it is a waste of time to talk about a new constitution; but whenever we are prepared to think fundamentally, that is, to go to the foundation, to think radically, that is, to go to the radix or root, when we may open questions now closed and consider all things simply on their merits, then it may be time to take up the question of a new constitution.[18] There is, perhaps, too little common ground between those whose conceptions are static and those who take the dynamic point of view to make discussion between them profitable.

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[18]Haines, *op. cit.*, pp. 209-210. "It seems necessary for the consideration of the problems of representative government and ministerial responsibility to bring under criticism certain well-known political ideas and traditions. With regard to the organization of government, just as in the field of law, mere tinkering with political forms and organizations will not meet the requirements necessary to adapt political institutions to modern conditions and tendencies. The leaders in political science will of necessity be required to devote more effort to the preparation of programs of reform and reconstruction involving entirely new procedure and practices and to the campaign for acceptance of these reforms as parts of the governing processes. Such reforms, as is the case with the plans for reorganization of courts fostered by various bar associations, will be adopted slowly. But the need in the field of political science with respect to radical reconstruction, both from the standpoint of legislation and administration, is equally as necessary as constructive reforms in the field of law. Half-way or temporary measures, such as the commission form of government in cities or the plan of administrative consolidation of bureaus, commissions, and other administrative agencies in state governments, though they may be serviceable in the direction of more effective administration, do not remove the fundamental defects in modern government. Nothing short of a new type of legislative body and a very much changed form of executive and administrative organization, with a well worked out plan of correlation between the two departments, will render modern governments competent to meet the exigencies of present political, social, and economic life."

NATURAL LAW IN AMERICAN POLITICAL THEORY

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Of all the concepts that have been employed in the development of political thought, none has appeared more frequently or has formed an integral part of more discussions concerning the fundamental problems of the state than that of a law of nature. From the days when the Sophists gathered in the arcades and the market place of Athens to demonstrate the antithesis between mere human law and that which comes direct from nature, to the present time when religious, social, and political conservatives appeal to the principles of a preceding generation as being of unchanging and fundamental value, the term has been employed in countless political arguments and has served as one of the basic concepts in many a treatise on the art or the science of politics. Aristotle believed that the laws of nature necessitated the organization of men into political groups; the Roman jurists, following the Stoics, and themselves succeeded by the Christian Fathers, asserted the existence of principles which are common to all men and are beyond their power to change; the Medieval theorists would have questioned the worth of the Christian religion almost as readily as the enduring force of certain fundamental rules of the *jus naturae;* Grotius found in the principles of natural law material for the building of an international law and Locke for the protection of the interests of the English landed gentry, just as Rousseau, Paine, and Jefferson were able to utilize certain of its rules to aid them in their work of destroying existing institutions.

But for all its long and distinguished history the theory of natural law fell upon evil days. With the rise of historical and utilitarian schools of political thought, and of historical and analytical schools of jurisprudence, and with the tremendous advances in scientific knowledge and the

general acceptance by social scientists of a more or less scientific method, the time came when nearly all reputable political scientists shunned the term, except perhaps to make slight obeisance to its place in history or to refer to its decease, even as they came to shun the concept of a social contract. Indeed the two went into exile about the same time and it is not difficult to see that their banishment is due to much the same cause or causes. If the myth of a state of nature and of a social contract has been shown to be spurious, is not the boon companion of these two historical frauds equally deserving of condemnation? Nevertheless, it seems that the last word has not yet been written about the death of natural law, for even though it has been annihilated in thoroughly historical and scientific fashion, it has shown a surprising lack of good taste in failing to take cognizance of that fact. Or, if it is dead, it has left behind a numerous set of thriving progeny, some bearing the family name, others bearing thinly veiled aliases and showing their origin by a strong family resemblance.

Believing that the theory of natural law is not only of historical importance but is among the concepts of political thought that are still to be reckoned with, the writer desires to indicate briefly the more important uses of the theory in the political thinking of past generations in order that some estimate of the value of this conception which refuses to cease to exist, even when addressed in no uncertain tones by learned jurists and doctors of philosophy, may be arrived at. Since any theory may be tested as to whether it has been of a constructive, a destructive, or a conservative nature, it seems probable that the best method of estimating the service or services of natural law is that of testing it by all of these standards. Certainly this method will not have the fault of unduly limiting the field of investigation.

The constructive use of the concept seems to admit of a threefold division, the judicial, the religious and the pioneer. There is, to be sure, a very considerable amount of overlapping in this classification, but it seems to be of value as indicating the points of view and methods of approach involved.

We are usually inclined to think of the common law as to be distinguished from the civil law in this, among other ways, that it is based almost entirely upon custom and has been influenced very little by any ideas of natural law. So far as the feudal age is concerned this seems to be largely correct, for this was a period in which law was considered as a body of rules determined by custom and of enduring validity.[1] However, as numerous recent writers have pointed out, the difference is largely one of names, not of principles.[2] Mainly because of opposition to the canon law, the term natural law was rarely used in the period of the struggle between the temporal and the ecclesiastical powers, and, although there are a number of notable exceptions, later judges and jurists ordinarily followed the precedent set at this time of speaking of the law of reason, or of jus-

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[1]McIlwain, *The High Court of Parliament and its Supremacy*, pp. 42, 51-52; Jenks, *Law and Politics in the Middle Ages*, pp. 24-25.

[2]Pollock, *The Expansion of the Common Law*, pp. 112 ff.; *The Genius of the Common Law*, p. 81; *Oxford Lectures*, p. 28; Holdsworth, *History of English Law*, II, pp. 512-513; Pound, *An Introduction to the Philosophy of Law*, *passim*; Haines, "The Law of Nature in State and Federal Judicial Decisions," 25 *Yale Law Journal*, pp. 621, 629, 652; Vinogradoff, "Reason and Conscience in Sixteenth Century Jurisprudence," 24 *Law Quarterly Review*, pp. 373 ff.

In the case of Bradford Corporation v. Ferrand, 2 Ch. 655 (1902), Justice Farwell said, "The foundation of the right as stated throughout all the cases is the *jus naturae* . . . I have come to the conclusion that *jus naturae* is used in these cases as expressing the principle in English law which is akin to, if not derived from, the *jus naturale* of Roman law, but the conception of *aequm et bonum*, and the rights flowing therefrom which are included in the *jus naturale* underlie a great portion of English Common Law; although it is not usual to find the 'law of nature' or 'natural law' referred to in so many words in English cases . . . I am not, therefore, introducing any novel principle if I regard *jus naturae*, on which the right to running water rests as meaning that which is *aequm et bonum* between the upper and lower proprietors."

On this point see also Jeffries v. Alexander, 8 H. C. L. 594, 648 (1860); Needles v. The Bishop of Winchester, Hob, 220, 225; Johnson v. Clark, 1 Ch. 311, 312.

tice or equity rather than of natural law.[3] Essentially the same conception as natural law has thus been employed to aid in building up some of the most important principles of the common law, particularly in the system of equity jurisprudence, the law merchant, the law of negligence, the rules applying to the powers of administrative boards and trusts, regulations concerning combinations, and the law of labor unions.[4]

It seems, then, that the concept of a law of nature, usually under the name of reason, justice, or the like, has been of decided importance in helping to construct the system of the common law. If this is true for England, conditions in this country have been even more favorable for the entrance of theories based on natural law. Leaving these exceptional circumstances for special treatment, the fact remains that although many of our jurists still retain the Benthamite or Austinian aversion to the theory of natural law "our courts have to go on making a great deal of law, which is really natural law, whether they know it or not, for they must find a solution for every problem that comes before them, and general considerations of justice and convenience must be relied upon in default of positive authority."[5] As Professor Cohen has pointed out, "Our analytical school of jurisprudence, pretending to study only the law that is, has been repeatedly shown to be permeated with an anonymous natural law...ethical views as to what is fair and just are, and always have been, streaming into the law through all the human agencies that are connected with it, judges and jurists as well as legislature and public opinion. Indeed

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[3] *Cf.* Salmond, "The Law of Nature," 11 *Law Quarterly Review*, p. 137; McIlwain, *op. cit.*, p. 72; Bryce, *Studies in History and Jurisprudence*, II, p. 600; Pound, "Common Law and Legislation," 21 *Harvard Law Review*, p. 383. For interesting exceptions to the usual aversion to the term see Bagg's Case, 11 Coke, 99a, and Blackstone, *Commentaries*, pp. 41, 43, 129-138.

[4] Pollock, *Expansion of the Common Law*, ch. iv; Pound, *Spirit of the Common Law*, especially chs. ii-iv.

[5] Pollock, *Essays in Ethics and Jurisprudence*, pp. 13, 23; cited by Cohen, "Jus Naturale Redivivum," *Phil. Rev.*, XXV, pp. 761-762.

the body of the law could not long maintain itself if it did not conform in large measure to the prevailing sense of justice."[6]

Whenever people find themselves in a new environment without a fully developed set of legal and political rules and institutions it is evident that there will be an exceptionally good opportunity for the utilization of general concepts such as nature and justice. In the early colonies, particularly in New England, the intensely religious modes of thought tended to add to the already excellent chance for the law of nature to be of service.

In the well known case of Van Ness v. Packard[7] Justice Story asserted that "Our ancestors brought with them its [the common law's] general principles, and claimed it as their birthright; but they brought with them and adopted only that portion which was applicable to their condition." It is evident that their condiions of life made necessary many changes in the institutions and laws to be found at that time in England. In most of the New England colonies, and to a lesser degree in most of the others, the strong religious sentiment seems to have brought about the notion of the identity of the law of nature with the decrees of the Divinity. In many cases there was no little opposition to the decrees of the English courts and especially to appeals from the colonial courts to England. The colonists seemed to desire to develop and maintain a system of their own, based in large part upon their interpretation of the Scriptures. In 1636 the Massachusetts General Court entreated the government to make a draft of laws "agreeable to the word of God" to be the fundamental laws of the commonwealth.[8] The Massachusetts Fundamentals provided that "In all criminal offenses where the law hath prescribed no certain penalty, the judges have power to inflict penalties

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[6] *Ibid.*

[7] 2 Peters, 144.

[8] Reinsch, *English Common Law in the Early American Colonies, Essays in Anglo-American Legal History*, I, p. 372.

according to God's word."[9] An interesting theory is that set forth by Cotton in speaking of human laws: he should not "call them laws because God alone has the power to make law, but conventions between men."[10] Essentially the same theory is held much later by John Adams. In the *Novanglus* he said, "How do we New Englanders derive our laws? I say not from Parliament, not from the common law, but from the law of nature and the compact made with the king in our charter."[11] It is to be noticed that he puts the king in the second place.

We find in New England, then, that a divine natural law is considered to be the binding fundamental law, the prevalent theory being practically uncolored by any notion of legislative sovereignty. This could but lead to the administration of a rather rude sort of equity and to the making of a considerable amount of law by the judges, but always under the guise of interpreting the laws of nature and of God.[12] In fact it seems that, at least for the New England colonies, little use of the English common law was made except in cases of appeal to the Mother Country. That this is true, in some degree, of the other colonies is evidenced by the statement of George Mason of Virginia: "the laws of nature are the laws of God; whose authority can be super-

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[9]Hutchinson, *State Papers*, p. 205; Reinsch, *op. cit.*, p. 374.

[10]Reinsch, *ibid.*

[11]*Works*, IV, p. 122.

[12]Numerous other examples of the use of natural and divine law are given in Professor Reinsch's essay. After the trial in the Hingham case, to cite an interesting illustration, the Deputy Governor stated in a public speech: "The great questions that have troubled the country are about the authority of the magistrates and the liberties of the people. The covenant between you and us is that we shall judge you and your causes by the rules of God's law and your own." *Op. cit.*, p. 375. Magistrate Symonds in the case of Giddings v. Brown, said that "the fundamental law which God and nature has given to the people cannot be infringed. The right of property is such a fundamental right. . . This resolve of the town being against the fundamental law is therefore void, and the taking not justifiable." *Op. cit.*, p. 376. The fundamental law of New

seded by no power on earth. All human constitutions which contradict his laws we are in convenience bound to disobey."[13]

As the people began to move back from the coast into the country around the head-waters of the rivers, then into the foothills and mountainous regions, and finally across the ranges into the lands where the waters flowed toward the Mississippi, the Gulf and the Great Lakes rather than toward Europe, they carried into the new areas many of the folkways and social customs of the old and comparatively highly developed civilization. So far, however, as political and legal institutions and principles are concerned, their burden was not a heavy one. Just as the first frontiersmen of the Atlantic seaboard settlements had found that many if not most of the principles of English law and government had to be greatly modified and supplemented in order to fit their notions of what was appropriate, so the pioneers of a later period discarded in no small part the accepted customs and principles of the original settlements. Not only was their need of the older order's law and government relatively slight, but their knowledge of any except the most general rules was insignificant.[14]

If the pioneers carried little save first principles with them it is evident that they have constructed to their own fancy a considerable portion of the structure found today in these regions. The refinements and the slowness of the

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Haven provided for the punishment of criminals "according to the mind of God as revealed in his word." *Op. cit.*, p. 386.

Professor Reinsch comes to the conclusion that "The analytical theory of Hobbes, making positive law independent of moral considerations and basing it on a sovereign will, was not accepted at that time. The law of God, the law of nature, was looked upon as the true law, and all temporal legislation was considered to be binding only in so far as it was an expression of this natural law. With such a view of the nature of legal obligations, it does not seem strange that the magistrates should look for the true law in their own sense of right and justice, or in the Puritan colonies, in the word of God."

[13]Jefferson's (Va.) Reports, p. 114 (1772).

[14]Pound, *The Spirit of the Common Law*, pp. 113 ff.

older system of counts and law were equally as out of place in the newly settled areas as the cumbersome and centralized machinery of the old governments. In the shaping of a new set of institutions, based, to be sure, upon those with which they had been familiar in the older states, it is certain that the 'pioneer ideals' which Professor Turner has described so eloquently were of very great importance.[15] Men were in daily physical contact with nature and they seem to have drawn from this contact certain inferences that aided them in the molding of their new governments. The demands of the immediate present and the facts of their environment, rather than statute or customary law of long standing seem to have determined their conceptions of justice and right.[16] In the Texas Convention of 1845 President Rusk, himself one time Chief Justice of the Texas Supreme Court, said that "when cases are to be decided, the eternal principles of right and wrong are to be first considered."[17] By eternal he meant, of course, not the principles accepted as of divine origin by the medieval lawyers or churchmen or even those taken to be of enduring validity by the Puritans, but those which the pioneers found to be of fundamental importance in their own environment.

That the pioneers in the building of a comparatively new system of law employed the notion of natural law, just as it had been employed in the building of the Roman and the English systems of law, is not difficult of demonstration. It is not so easy, however, to indicate how this sort of theory was employed in the development of political institutions. The general aversion to what is usually called 'theorizing' in American political development is especially true of the frontiersmen.[18] About the only way we can ascertain what they thought about the value of various political ideals is by studying the institutions which were developed out of fron-

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[15] See his *Frontier in American History*, especially ch. x.

[16] *Ibid.* See also Pound, *op. cit.*, ch. v.

[17] Quoted by Butte in 26 *Yale Law Journal*, p. 699.

[18] *Cf.* McLaughlin, *Steps in the Development of American Democracy*, pp. 104 ff.

tier life. Freedom of the individual from governmental restraint, local self-government, popular election of all public officers, equality of political power, and the spoils system seem to them to have been the only natural, hence the only just principles upon which governments could be organized. These institutions really represent the use of certain political ideals that in previous ages would have been urged upon the basis of the laws of nature. Certainly utilitarianism, the antithesis of argument based upon nature or right, is rarely heard of, and they never found it necessary to contend that their ideals, destined to become actualities both for the frontier and for the older states, would secure the greatest amount of happiness. When principles are considered to be natural ones no such proof is needed.

Important as the constructive function of natural law may have been in American political thought, the destructive use of the concept has attracted far more attention because it has been of a much more spectacular sort, particularly in connection with the two most important struggles in American history—for independence and for the abolition of slavery. In both cases the appeal was against certain existing relationships or rules of law on the grounds of the natural rights of man.[19] The fundamental position of those relying upon the natural rights phase of natural law is the same whether they deal with the right "to assume among the powers of the earth the separate and equal station to which the laws of nature and of nature's God entitles them," or assert that "the right to enjoy liberty is inalienable. To invade it is to usurp the prerogative of Jehovah."[20] In both cases the emphasis is negative or destructive, that is, the assertions deal with rights or privileges which men are en-

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[19]The colonists contended that the law of England was on their side whenever it was at all possible to make out such a case, although even in such cases as these they usually included a few phrases dealing with their rights as men. The abolitionists had no law to appeal to save a higher law than all man-made constitutions or statutes.

[20]Platform of the National Anti-slavery Party, 1832.

titled to enjoy, not with natural laws which they must obey or which determine the character of new institutions.

Not only did the radical Jefferson and Paine assert that "all men are created equal, that they are endowed by their Creator with certain unalienable Rights,"[21] and that "natural rights are those which appertain to man in right fo his existence...every civil right has for its foundation some natural right...all men are born equal and with equal natural rights,"[22] but also the more conservative leaders of the type of John Adams contended, at least during the Revolutionary period, that the rights of men are founded "in the frame of human nature" and derived from "the Great Legislator of the Universe," and that "the sacred rights of mankind are not to be rummaged for among old parchments or musty records. They are written as with a sunbeam in the whole volume of human nature, by the hand of the Divinity itself and can never be erased or obscured by mortal power."[23] A half century or so later we find Seward in his eleventh of March speech appealing to a higher law than the Constitution.[24] Chase in his argument in the Van Zandt case against the validity of the fugitive slave law, and Lincoln in his interpretation of the Fathers' idea of equality and equal rights[25] deal with the same conception: the existence of certain fundamental rights of all men (even the negroes) which are derived not from the laws of any state but from the laws of nature and nature's God and which are consequently superior to any law of man's making.

To re-emphasize this negative aspect is to belabor it, for the destructive use of natural law has passed into our traditions. But what does need attention is that natural law

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[21]With this extract from the Declaration of Independence, compare Article I of the Virginia Declaration of Rights.

[22]*The Rights of Man.*

[23]Merriam, *American Political Theories*, p. 48.

[24]See Hosmer, *The Higher Law* (1852), and Thoreau, *Civil Disobedience* (1849).

[25]Speech at Springfield, June 26, 1857.

has meant more than a destructive theory of natural rights.[26]

It is to be expected that in a period such as the Middle Ages when there is no theory of progress, when even their ideals are static ones, natural law would be made to serve a conservative purpose, that is, to uphold the existing order in all its phases.[27] But that natural law has also served this purpose in America, where we take progress for granted[28] just as we do prosperity or the greatness of our nation, can easily be proved. There has been a considerable amount of this sort of theorizing in all the periods of our thought, even in those where old institutions are being attacked or new ones are being constructed with the aid of natural law, but the principal conserving use of the concept has come in periods following those which are primarily constructive or destructive in their nature. Then comes the time when natural law ceases to be the companion of the religious devotee, the crude frontiersman, or the unsparing revolutionist, and associates upon the most friendly terms with the political and legal mouthpieces of a well established, hence respectable, order. Revolutionary natural rights once gained, the transition to legal rights is easy to make. Furthermore the natural rights in question are ordinarily conceived of as having a static content; once realized noth-

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[26]American writers have always tended to identify natural rights and natural law. Thus Lieber states that "natural law is the body of rights which we deduce from the essential nature of man." *Political Ethics*, I, pp. 68, 177. *Cf.* Williams, *The Foundations of Social Science*, ch. xiii. This confusion is due to the most conspicuous use of the concept in the seventeenth and eighteenth centuries in the English, American and French Revolutions and to the theory in the slavery controversy in this country in the nineteenth century. That the theory of natural *law* has included far more than theories of natural *rights* is hardly open to question. During the ancient and medieval periods there was much talk of natural law but natural rights were practically unknown. *Cf.* Bryce, *Studies in History and Jurisprudence*, II, ch. xi. Carlyle, *History of Medieval Political Theory in the West.*

[27]Carlyle, *op. cit.*

[28]*Cf.* Hoover, *American Individualism.*

ing more in the field of individual liberty remains to be secured. Thus the framers of the early state constitutions were at the same time revolting against certain laws of England[29] and inserting in their own fundamental laws provisions guaranteeing the continued existence of the natural rights for which they were fighting.[30]

The best illustration of the conservative use of the concept of natural law in this country has been in connection with the development and extension of the practice of judicial review of legislation.[31] The schools of jurists that have held sway during the period in which we may be said to have had any jurists at all have been historical and analytical. They have, with rare exceptions,[32] contended that it is no part of the judge's work to consider factors of utility or social advantage. Rather have they, when they could discover no accepted rule of law upon which to base a decision, relied upon notions of justice or reason, that is they have employed the concept of a law of nature although another name has usually been employed.[33] A few examples will serve to make this clear.

In Loan Association v. Topeka[34] the Supreme Court of the United States held that "It must be conceded that there are rights in every free government beyond the control of the state," and in Holden v. Hardy,[35] "It is sufficient to say that there are certain immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard." The ancient common law term 'reason' has been used extensively in certain kinds of

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[29]*Cf.* McIlwain, *The American Revolution.*

[30]Holcombe, *State Government in the United States*, ch. ii.

[31]Haines, *op. cit.* Most of the cases here cited or referred to are discussed in this valuable article.

[32]For a very exceptional statement of the part played by economic interest in the growth of the common law, see Holmes, *The Common Law*, pp. 35-36.

[33]On the use of the term reason and others of a similar nature, see Haines, *op. cit.*, especially pp. 621, 652.

[34]20 Wallace, 655, 662 (1874).

[35]169 U. S. 366, 389 (1897).

cases, particularly with regard to the police power.[36] Thus as early as 1819 the Court held that arbitrary legislation is clearly contrary to all standards of reasonableness, and hence is not the law of the land.[37] Plessy v. Ferguson[38] determined that "every exercise of the police power must be reasonable." That there is no clearly defined or universally accepted standard of reasonableness deters the courts not at all.

Nor have the state courts been at all hesitant in taking the same attitude toward the constitutionality of legislation. In Barbour v. Louisville Board of Trade[39] the Supreme Court of Kentucky held that it is possible for the court to declare unconstitutional an act of the legislature contrary to natural justice, as, for example, an act making a man a judge in his own case. The Supreme Court of Massachusetts has held that a statute which violates the fundamental rights of man may be unconstitutional, although it violates no specific provision of the constitution.[40] In a Georgia case justice under natural law is referred to as the basis for holding a statute unconstitutional, although the court also brought in the doctrine of due process of law as a support.[41] Justice Brewer, in a Kansas decision, declared that in determining the limitations upon the legislature the court must look first to "essential truths, those axioms of civil and political liberty."

The concepts of due process of law and liberty of contract as developed and applied by the courts have made possible many judicial vetoes on the grounds of justice, reason or natural right.[42] In fact, if not in legal theory, the func-

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[36]See Freund, *The Police Power*, especially Sec. 63.

[37]Bank of Columbia v. Okey, 4 Wheaton 235, 244 (1819).

[38]163 U. S., 537.

[39]82 Kentucky, 645, 648 (1884).

[40]Commonwealth v. Perry, 155 Mass. 117 (1871). *Cf.* Spann v. City of Dallas, 235 S. W. 513.

[41]Pavesich v. Insurance Company, 122 Georgia, 190 (1904).

[42]See Pound, "Liberty of Contract," 18 *Yale Law Journal*, p. 454; Hand, "Due Process of Law and the Eight Hour Day," 21 *Harvard Law Review*, p. 495; Hough, "Due Process of Law Today," 32 *Harvard Law Review*, p. 218; McGehee, *Due Process of Law*.

tion of applying such doctrines has given to the courts a very influential sort of political criticism. As Professor Corwin has put it, "the modern concept of due process of law is not a legal concept at all; it comprises nothing more or less than a roving commission to judges to sink whatever legislative craft may appear to them to be, from the standpoint of vested interests, of a piratical tendency."[43]

The theory upon which such cases has been decided has little reference to the solution of the present problems of an industrial democracy. It is a theory of right, not of utility. Principles which were put in the early constitutions to serve as protection against what were considered autocratic rulers have not only been applied as against the representatives of the people but have been given an even wider meaning than they formerly enjoyed. If a law would have been contrary to the prevailing conception of the natural liberties of individuals a century or a century and a half ago, in a period of revolutionary or frontier democracy, it seems entirely reasonable to the judicial mind that the law would be dangerous today, and if dangerous, unconstitutional. Wherever possible the grounds of unconstitutionality are asserted to be a provision or provisions of the constitution, even where, as in the case of due process, this involves a decidedly strained interpretation of the meaning of that provision; where no such provision is available the law of nature or of reason is appealed to.

Nothing is more certain about the nature of this concept as it has been used in our political thought than that it belies its name and its reputation. The law of nature is not an infallible guide; it is a flexible instrument. The service of many masters and the playing of many parts has been its lot. It has been employed to bolster up claims for new rights and to strengthen old standards of right. It has been used to help in building certain institutions, only to have them torn down by a new generation who assert that they are contrary to *their* ideas of natural law, and still later has

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[43] *American Political Science Review*, May, 1912.

been used to aid in supporting the principles enunciated by the winning side in the struggle.

As natural law has been used in so many ways it is clearly impossible to give it a single definite meaning, but, in general, it has been represented as a power or a standard, not of man's making, beyond his power to change, but which may be ascertained by his reason or his intuition. To be somewhat more concrete, the concept has ordinarily stood for a theistic or deistic idea of the whole universe or of the unalterable laws of the universe which are common to and binding on all men. In some cases it has been an ideal of what should be as set off against what is conceived of as actually existing, but even here the ideal is asserted to rest upon certain basic laws of the universe and is hence, in the final analysis, more real than the existing rules or institutions which are being attacked. During the period when theories of a state of nature and of a social contract were generally accepted, the concept frequently denoted the original characteristics of individuals or of society as contrasted with those subsequently acquired, but this use has not been of lasting importance.

In most instances where natural law has been set up as a standard, perhaps by both sides to a controversy, it seems evident that a good case could have been made out on the basis of utilitarian reasoning. Why is it that the appeal was to principles of natural law rather than to the greatest happiness or welfare of those concerned?

First among the motivating factors is the religious. To one holding to a theory of a divine purpose and power behind the universe it seems perfectly logical to speak of the laws of nature and of nature's God as being of ever-present and fundamental importance. All branches of our thought, particularly during the seventeenth and eighteenth centuries, have been highly colored by this sort of theology; in some cases the social and political thought seems to have been dominated by current theology almost to the extent of the medieval period.

Another and related cause has been admirably expressed

by Mr. Justice Holmes. "There is in all men a desire for the superlative,"[44] a desire to state their purpose in terms of absolute truth, to call to their support principles of universal validity. Mere man can feel sure that he is expounding the eternal verities only when he is interpreting the laws of the universe; before them the shifting values of this world must give way.

One of the many acute observations on the ways of the political animal made by de Tocqueville was to the effect that "there is a natural tendency to confound institutions that are necessary with institutions to which one has grown accustomed."[45] Whenever any custom has received a prescriptive sanction from habit, we tend to take its continued existence for granted, to see it through the eyes not of reason but of faith. The laws of nature are frequently nothing more than those of the habits or customs with which we have become so familiar that they seem to be the only possible ones.

No matter how complex a problem may actually be, the inclination is to reduce it to the simplest possible terms. Whatever simplifies it aids in reaching a conclusion; if one can pass judgment upon it without the necessity of investigating the many factors involved and of thinking out a decision based upon this investigation so much the better. Natural law is thus a welcome substitute for inquiry and thought. And not only does it simplify the problem but it also calls to the assistance of the individual in question the best of arguments and authorities. It is an almost undebatable basis of argument. Contentions founded upon well worked out notions of human welfare have frequently received scant attention if the opposing theory was stated as an immutable law of nature. Practically the only way to refute such argument is to have another interpretation of the immutable law in question. Much the same is the rea-

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[44] *Natural Law*, included in his *Collected Legal Papers*, p. 310.

[45] *Souvenirs*, p. 111. *Cf.* Sumner, *Folkways*, especially ch. xv. See also Dewey's *Human Nature and Conduct* on the psychological problem concerned—the influence of habit.

son that one can sometimes find no other ground upon which to rest his case; thus the injunction of Aristotle: "When you have no case according to the law, appeal to the law of nature. Argue that an unjust law is no law."[46] Another allied motive is to be found in the reluctance (especially of courts) to put forth projects or doctrines as representing merely one's own views of what should be or is. The law of nature is an ever present authority upon which such views can be based.

"These reasons may be all very well during the childhood of the race" the modern scientific realist will answer, "but with the advancement of the knowledge of human history and human nature, we have come to realize that these laws are man-made and self-imposed; why continue to use such primitive, superstitious terminology? Why not recognize that all laws are man-made and that they can consequently be re-made when it pleases him?"[47] As has been indicated above, this has been approximately the position of the social scientist during the past half century or more. Strangely enough, however, the tide seems to be turning, slowly and hesitatingly to be sure, back towards some degree of mysticism. Mr. Chesterton is reported to have said to Mr. Shaw, "When you can explain conclusively and convincingly how the daisies grow, we will be willing to admit that you can teach us something."[48] In other words the mystic will not only reply with Spinoza that man is not a rational creature, he is merely striving to become one, but also with Chesterton that scientists have been able to tell us nothing of fundamental importance about human life. If human life is subject to laws not of our making, is it not evident that the basic laws of the social and political order are properly called natural laws?[49] At any rate, whether or not a

[46] *Rhetoric*, 1375, a, 27.

[47] *Cf. An Introduction to Reflective Thinking* by a group of Columbia Associates, especially p. 265.

[48] *The Living Age*, October 6, 1923, p. 39.

[49] "That the universe has in it more than we understand, that the private soldiers have not been told the plan of campaign, or even that there is one, rather than some vaster unthinkable to which every

reaction against too great reliance upon scientific method in the social sciences be the cause, it is certain that there has, in recent years, been something of a revival of natural law, especially by the jurists. This has been particularly true on the Continent,[50] but even in England[51] and America[52] voices have been raised in its defense.

An adequate consideration of the dangers involved in the use of this concept and of the services which it may render is beyond the scope of this paper. Some mention of the possibilities of natural law will, however, be appropriate.

The most obvious and most important danger is that natural law will be made a substitute for investigation and "reflective thinking" on the basis of the information secured thereby; that is, that it will be uncritically relied upon and will be used to override considerations of general welfare.[53] Furthermore, there is the danger that, as court decisions have made clear in this country, a static natural law will be asserted in the face of a changing social order.

On the other hand, if the instrument we call natural law

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predicate is an impertinence, has no bearing upon our conduct. We still shall fight . . . It is enough for us that the universe has produced us and has within it, as less than it, all that we believe and love. If we think of our existence not as that of a little god outside, but as that of a ganglion within, we have the infinite behind us. It gives us our only but our adequate significance. A grain of sand has the same, but what competent person supposes that he understands a grain of sand?" Holmes, *op. cit.*, p. 316.

[50]Stammler, *Ueber die Methode der geschlichen Rechstheorie; Lehre von Richtigen-Rechte;* Charmont, *La Renaissance du droit naturel;* Jung, *Problem des natürlichen Rechts;* Platon, *Pour le droit naturel;* Saleilles, "Ecole historique et droit naturel," *Revue Trimestrielle de droit civil,* I, pp. 80-112; Duguit, *Traite de droit Constitutionnel;* Krabbe, *The Modern Idea of the State.*

[51]Pollock, *Expansion of the Common Law;* Laski, *Authority in the Modern State, Foundations of Sovereignty.*

[52]Pound, *Introduction to the Philosophy of Law;* Cohen, *op. cit.*

[53]A very interesting and significant example of the victory of scientific data over outgrown theories of natural law is the case of Muller v. Oregon (U. S. Supreme Court, 1907) where the mass of evidence presented in the brief of Mr. Brandeis caused the court virtually to reverse previous decisions.

has been used for harmful purposes, is it not quite possible that it may be put to good uses? As Dean Pound has recently pointed out, natural law has been one of the most valuable weapons in the legal armory in past periods of legal development, and there is no reason why it may not be so used in the future. A natural law with a changing content, as Stammler puts it, may be a valuable supplement to the scientific method.[54] Social and political problems are so complex and have such infinite ramifications that they cannot be studied in isolated, truly scientific fashion. When the available data is secured a conclusion remains to be made, for the information gathered by research and experiment only furnishes the material or part of the material, upon which a judgment should be formed. Here will ordinarily lie the proper place for ideas of natural law. As Spencer expressed it, "an ideal is always needful for right guidance."[55] In short, the concept of a law of nature has proved to be such a valuable instrument in helping to destroy repressive institutions and to build up better ones that we should not discard it, simply because it has been used in ways that seem to us to be harmful, unless we are certain that we have a better one to put in its place. To be of the greatest service the content of natural law should change with the development of what Krabbe calls the people's sense of right. It is not a weakness but a strength of natural law that it represents a "bundle of opinions" as to what is just. It is not necessary for us to believe that the voice of the people is the voice of God to believe that the general sense of right and justice of a given period should be as the laws of nature for that period.

[54] A similar point has been made by Professor Smith in an article on "The Trend of Philosophy" in the *Christian Century*, October 11, 1923, p. 1302. "Recognizing once for all that no equipment of man—neither instinct nor conscience nor reason—can absolve him from experiment, man can with a royal good will at last advance to capitalize and to exploit the unique facility he has for making guesses in times of stress and for revising and elaborating them in times of leisure, consequences accruing as guides meantime."

[55] Quoted by Holcombe, *Foundations of Modern Commonwealth*, p. 268.

THE JURY SYSTEM OF THE SOUTHWEST

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I. What is meant by trial by jury?

At a time when a scientific and sympathetic attempt is being made by leading men in the legal profession and by students of civil government to reorganize state and federal courts and to simplify their procedure, it is necessary to answer the above question in order to know to what extent efforts at reform are blocked by the guarantee of trial by jury found in the state and federal constitutions.

It is clear from history that the concept of trial by jury has been a constantly changing one. Its origin is controversal, being found by some scholars in the practice of the Greeks and Romans, by others in the institutions of the Teutonic colonists of the Roman Empire, while still others declare that the institution is indigenous to the soil of Britain. Professor Haskins of Harvard University maintains that the jury is essentially Norman French in its beginnings and was used in Normandy by the father of Henry II.[1] Professor Thayer says, "Things indicate the breaking up and confusing of older forms: anomalies and mixed methods present themselves. The separate nations of the complaint secta, the fellow-swearers, the business witnesses, the community witnesses, and the jurors of the inquisition and the assize run together."[2]

If nineteen places could wage war over the birth place of Homer, it is not strange that a similar contest has resulted over the indigeneity of the most venerated institution of modern jurisprudence. The evidence is so conflicting that history cannot point out the nativity of this institution, but is forced more or less to evade the question by conclud-

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[1]Haskins, Charles Homer, *The Early Norman Jury, American Historical Review*, Vol. VIII, p. 16 ff.

[2]Thayer, P., *Preliminary Treatise on Evidence*, p. 18.

ing that the constituent elements of trial by jury are thoroughly cosmopolitan, with special emphasis placed on the English contribution to the institution as it is now known among English speaking peoples. "To suppose," said Edmund Burke, "that jurors are something innate in the constitution of Great Britain, that they have jumped, like Minerva, out of the head of Jove in complete armor, is a weak fancy, supported neither by precedent nor by reason."[3]

Here, then, is indubitable evidence that this institution has been in a state of constant flux. It has traversed a long road from the Norman inquisition, the asssize of Henry II, or the institution much lauded by Lord Coke.

When the jury was in its inquisitional stage it merely furnished information to an officer of the court. The inquisitors were expected to know about community affairs and were disqualified for service if they did not as contrasted with our present jurors who are challenged unless they are ignorant of the facts of which they are the judges. Here is a complete change in the community element in this institution.

In the thirteenth century it appeared that it was not proper for the same jurors who found the bill of indictment to act also as a jury to try the accused for their own indictment. It was obvious that the jurors would likely maintain in the second instance what they had sworn to in the first. An indictment sworn to on a basis of common rumor might be entirely incorrect in fact. It was seen that there were two distinct functions here and that there were needed, therefore, two juries. This evolution ended in the establishment of the trial jury as a separate institution from what we now call the grand jury, which possesses more nearly the characteristics of the old inquisition than the modern petit jury which is English in origin, functionally speaking.

One of the fundamental changes in the development of trial by jury was the growth of a distinction between law and fact. In all the older courts in England it was cus-

[3]Burke, Edmund, *Works* (3 ed.) VII, 115.

tomary for the jury to declare what the custom was. The judge during this period was a mere presiding officer. He was only a moderator or an umpire. At a still later date after the judge had begun to declare the law, there existed in England special custom which only the jury could pronounce. The juries under the reign of Henry II seemed to have confined themselves to judging of the facts; however, it is not to be inferred that there was a basis of such nicety of distinction as exists today. Of course, this line of demarcation is still in process of formation. What is a fact is a much mooted question in courts at the present time. This line is a very important one because it determines the role of action of the judge as well as the jury in our modern common law procedure.

It was also characteristic of the early jury that it was used in matters that were not strictly judicial in character. It was means of securing from representative citizens information of any kind that the king needed. It might be concerning economic, religious, or political affairs. In fact in Plantagenet England, it was used merely incidentally in the administration of justice and primarily as a very valuable adjunct of the exchequer to exact fees from His Majesty's subjects.

It is also worthy of note that the modern grand jury is used only in criminal matters. That is the old inquisitional function of the jury that was used to secure information concerning both civil and criminal matters is now restricted exclusively to criminal jurisdiction.

The above citations are sufficient to establish the thesis that trial by jury has been a constantly changing institution. It has changed its purpose, its methods, and its functions. From being an instrument of the king, it has become an ally of democracy. From being a means of exploiting the individual, it has become the protector of individual rights. It is evident from the previous decussion that trial by jury is a rather indefinite phrase, unless it is identified with some particular period of its evolution.

II. What is meant by trial by jury as used in our federal and state constitutions?

A. In the Federal Constitution.

It is interesting to note that at the time of adopting the federal constitution there was no definite conception of trial by jury in the United States, and that this fact prevented the federal convention from adopting any particular system of trial by jury to be used by the federal courts. In fact, trial by jury in civil cases was not provided for in the constitution. Hamilton, having made a brief review of the differences in the practices of the various states, says, "From this sketch it appears that there is a material diversity, as well in the modification as in the extent of the institution of trial by jury in civil cases, in the several states: and from this fact these obvious reflections flow: first, that no general rule could have been fixed upon by the convention which would have corresponded with the circumstances of all the states: and secondly, that more or at least as much might have been hazarded by taking the system of any one state for a standard, as by omitting a provision altogether and leaving the matter, as has been done to legislative regulation."[5]

In the federal and territorial courts, the right of trial by jury in civil cases is guaranteed by the Seventh Amendment which states that "in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law."[6] Since the first ten amendments apply only to the national government, the above guarantee does not apply

The constitution does not define what it meant by trial by jury, and, since the states differed in their conception and practice of it, the federal courts chose to follow the common law of England rather than the practice of any particular state.

It should be pointed out in this connection that while

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[4]*Constitution of the United States*, Art. III, Sec. 2, Sub. Sec. 3.
[5]*The Federalist*, No. LXXXIII.
[6]*Amendments to the Constitution*, Art. VII.

to the states.

the incidents of trial by jury in England in 1790 were adopted, yet it does not follow that they were to become unalterable. What may be regarded as fundamentally a part of trial by jury? "It is a question of substance," says Scott, "and not of form."[7]

B. In the constitution of the Southwestern States.

The right of trial by jury is held inviolate in all the Southwestern States except Louisiana, where it is guaranteed in criminal prosecution only and where cases not involving imprisonment at hard labor or death penalty may be tried without a jury and by a jury of less than twelve. What is the essence of the jury system in these states?

1. Number of jurors. Does a jury have to consist of twelve, no more and no less? It has been maintained that Magna Carta guaranteed a trial by a jury of twelve, but this is incorrect. Magna Carta did not guarantee trial by jury at all. "At the beginning of the thirteenth century, twelve was the usual but not invariable number," says Scott.[8] This number later became fixed and sacred. Lord Coke said, "And it seemeth to me that the law in this case delighteth herself in the number of 12 . . . and that number twelve is much respected in Holy Writ, as 12 apostles, 12 stones, 12 tribes, etc."[9] A New Jersey statute establishing a jury of six was held unconstitutional in 1780 by the supreme court of that state as violating the provision that "the inestimable right of trial by jury shall remain confirmed as a part of the law of this colony without repeal forever."[10]

This element of trial by jury has been almost completely changed. In New Mexico, a jury may consist of six persons in trials below the district courts;[11] in Oklahoma, the jury shall consist of six in the county courts and courts not of

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[7]Scott, Austin Wakeman, *Fundamentals of Procedure in Actions at Law*, p. 74.

[8]McKechnie, *Magna Charta* (2nd ed.), 134-38, 357-82.

[9]Scott, *op. cit.*, p. 76.

[10]*Holmes v. Walton*, American Historical Review, Vol. IV, 456.

[11]*Constitution of New Mexico*, Art. II, Sec. 12.

record;[12] in Arizona, provision may be made by law for a jury of less than twelve in courts not of record;[13] in Texas, the jury in county and justices' courts consists of six persons fixed by law and not by the constitution;[14] in Arkansas, trial by jury may be waived by the parties in a manner prescribed by law;[15] in Louisiana, cases not involving imprisonment at hard labor or death penalty may be tried without jury or with a jury of less than twelve.[16]

2. Unanimity of decision.

Is unanimous concurrence of the jurors an essential of trial by jury? By the middle of the fourteenth century, the rule of unanimity was definitely established, and its requirements were met by starving or freezing the jury into an agreement. The courts do not permit this essential of the jury to be varied by statutory enactment unless provided for by the constitution. A great many states have provided in their constitutions for verdicts by less than the whole number of jurors in civil cases.[17] Texas and Arkansas require a unanimous verdict of the jurors, but Arizona, New Mexico, Oklahoma, and Louisiana do not demand unanimity. Arizona accepts a verdict of nine or more jurors in civil cases in any court of record.[18] Each juror must sign the verdict when unanimity is not obtained. The constitution of New Mexico grants authority to the legislature to provide for the rendering of verdicts in civil cases by less than a unanimous vote, but this has never been done.[19] Nine jurors concurring may render a verdict in civil cases in Louisiana.[20] Oklahoma is the most liberal

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[12] *Constitution of Oklahoma*, Art. II, Sec. 19.

[13] *Constitution of Arizona*, Art. II, Sec. 23.

[14] McIlwaine, John S., *Digest*, Art. 3231 (3103).

[15] *Constitution of Kansas*, Art. II, Sec. 7.

[16] *Constitution of Louisiana*, Art. 9.

[17] Arizona, California, Idaho, Minnesota, Mississippi, Missouri, Montana, Nevada, New Mexico, Ohio, South Dakota, Utah, Washington.

[18] *Constitution of Arizona*, Art. II, Sec. 23.

[19] *New Mexico Statutes*, 1915, Art. 3090, Sec. 4.

[20] *Annotated Revision of Statutes of Louisiana*, 1915, Art. 3946, Sec. 13.

Southwestern state in this respect. Three-fourths of the jurors may render a verdict not only in civil cases, but also in criminal cases below felonies.[21]

3. Impartiality and Competence.

The jury must be impartially selected and a fairly competent tribunal. "Any action, legislative, executive, or judicial," says Scott, "which excludes from the jury all members of a class, deprives a member of that class of the right to trial by jury."[22] The constituting of the jury is so carefully guarded that almost all the competent material in fact is excluded to secure competency in the eyes of the law. People read the papers in order to be excused from jury service. Most any mode of selecting a jury is constitutional if it is fair.

4. Method of selecting the jury.

The jurors in all the Southwestern States are selected by jury commissioners,[23] appointed by the district or circuit judges for one year. These commissioners vary in number from three to five, must possess the qualifications of jurors, and in Oklahoma and New Mexico where the commission consists of only three members, only two can come from the same party. In Louisiana the commission has five members plus the clerk of the court. Three members with the clerk constitute a quorum. The commissioners hold office at the pleasure of the court.[24] The commissioners are usually paid a per diem of $2.00 or $3.00 for the actual time employed in doing this work. In New Mexico, they are paid a mileage of six cents per mile each way in addition to $3.00 per day.[25] The commissions take an inventory of the available jury material and make out a list of jurors for a term of court. They turn this list over to the clerk of the court. The clerk at from ten to thirty

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[21]*Constitution of Oklahoma*, Art. II, Sec. 19.

[22]*Gibbs v. State*, Heisk (Tenn.), 72 (1871).

[23]The commissioners are called a board of supervisors in Arizona, *Revised Statutes of Arizona*, 1913, Art. 3522.

[24]*An Annotated Revision of Statutes of Louisiana*, 1915, II, Art. 3935, Sec. 3.

[25]*New Mexico Statutes*, 1915, Art. 3107, Sec. 51.

days before the opening of the term of the court makes certified copy of the list of jurors and delivers the same to the sheriff, who notifies those designated on the list to appear at the proper time and place for jury service.

In New Mexico three hundred persons must be selected if there are that many in the county; otherwise as many as the judge requires provided the number does not fall below one-tenth of the voters in the county.[26] These names are put in a jury wheel which is used by the court as a depository for the names of those who are to render both grand and petit jury service and which is kept under key. In Arkansas the commission selects alternates as well as jurors who are used in case some of the jurors prove incompetent or are excused from jury service.[27]

In Texas, the commissioners select one hundred persons from the citizens of different portions of the county, or a greater or less number if the judge so orders, who are free from legal exception, "of good moral character, of sound judgment, well-informed, and so far as practicable, able to read and write."[28] The names of these persons are written on slips of paper as nearly the same size as possible which are placed in a box. After shaking the box thoroughly, the commissioners draw out thirty-six names one by one, for each week of the term of court. These lists are certified and sealed, and then delivered to the judge who in turn delivers them to the clerk of the court. The clerk within not less than ten days prior to each term of court opens these sealed lists, makes copies of them and turns the same over to the sheriff to be summoned for jury service.

5. The qualification for jury service.

A juror, generally speaking, must be a citizen of the state and county in which he is to serve. He must be a freeholder in the state or a householder within the county. He must be of sound mind and good moral character, and be able to read and write. He must not have been convicted of felony nor be under indictment for theft or felony. These

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[26] *Ibid.*, 1915, Art. 3091, Sec. 5.

[27] *Digest of Statutes of Arkansas*, Sec. 6344.

[28] McIlwaine, John S., *Digest*, Art. 3158.

are his positive qualifications. On the negative side, he must not be a witness in the case, nor interested in the subject matter of the case, nor related by consanguinity or affinity within the third degree to either party to the suit. He must not possess any bias or prejudice in favor or against either party to the suit. These are the several qualifications that vary somewhat with the state.

6. The province of the jury.

Trial by jury consists of two parts—one is performed by the judge, the other by the jury. What shall be the relation of the judge to the jury? Of what shall each be the judge? The line of demarcation between the role of the judge and that of the jury has constantly shifted, usually varying in favor of the one that society regards more favorably. The rule of division since the days of Blackstone has been that the court shall be the judge of the law and the jury the judge of the facts. But as soon as one starts to apply this rule, the question arises what is a question of fact or a point of law. Here is where the contest is still being waged.

The jury in American state courts plays a larger part than in either American federal courts or English courts. At the time America was being settled, the English judges under the control of the Stuart dynasty were coercing English juries and oppressing the people. The jury came to be regarded as the bulwark of liberty. This enthusiasm followed the jury to the New World and has been a persistent influence in judicial administration in the American states. After the Revolution of 1688 and the act of settlement of 1700, which provided that judges should hold office for life or during good behavoir rather than at the pleasure of the king, public opinion reacted in favor of the judge in England, who is now the strongest judge in the world. The place of the jury in the American state judiciaries is just about what it was in England during the reign of the Stuarts.

The position of the jury in the Southwestern States in the judicial process is a little more prominent than in the average American state. Frontier influences, popular elec-

tion of judges, and legislative jealousy of the courts, and, in some instances, almost hostility account largely for the minor role played by the state judge in the Southwestern States in trial by jury.

While it is true that the legislatures determine the relation of the judge to jury by statute, yet it has happened that the state judges have still further restricted themselves by interpreting these procedural laws very strictly.

The general rule in the Southwestern States is for the court to discuss the law in the case and the jury to pass on facts.[29] The interpretation of what is a matter of law and a question of fact has been so decided as to give the jury the advantage in nearly all instances. The judge's charge to the jury must be absolutely colorless or he has committed an error that justifies an appeal. He cannot even hint at the weight of the evidence, yet this instruction is undoubtedly greatly needed by the jury. When it is reflected that our juries are made up of almost the rabble of our population, it is obvious that they should have the guidance of the judge in reaching their verdicts.

7. Exemption from Jury Service.

In Texas there are ten classes of persons exempt from jury service by law.[30] These are all persons over sixty years of age, civil officers of the state and the United States, overseers of roads, ministers of the Gospel, physicians, attorneys, publishers, school teachers, druggists, undertakers, telegraph operators, railroad agents, ferry men, millers, railroad officials (presidents, vice-presidents, conductors, and engineers), jury commissioners of the preceding twelve months, state militia, and firemen in towns of fifteen hundred or more inhabitants. Arizona has prac-

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[29] *Digest of Statutes of Arkansas*, Sec. 6344; *Compiled Laws of Oklahoma*, 1909, Sec. 5785; *Revised Statutes of Arizona*, 1913, Sec. 515. See also *Ter v. Kay*, 3 Ariz. 92-121; *Jordan v. Duke*, 4 Ariz. 278-336; *Koster v. Campbell*, 6 Ariz. 145-53; *New Mexico Statutes*, 1915, Art. 2796, Sec. 4; McIlwaine's *Digest*, Art. 715, *Code of Criminal Procedure*.

[30] McIlwaine's *Digest*, Art. 3142.

tically the same law.[31] This list varies very little in the other states.

In addition to this exempted list, the judges excuse a great many from jury service. All influential relatives and friends are usually released from jury service. There are still others who deliberately do or say things which disqualify them for jury service. Finally the courts are forced to accept the professional jurors who hang around the court houses.

The law regulating excuses is generally so liberal that it simply becomes the judge's pleasure. Arizona, however, has a very strict law on excuses which states that, "A juror shall not be excused by the court for slight or trivial cause, and for hardship or inconvenience to his business, but only when material injury or destruction to his property or that of the public intrusted to him is threatened, or when his own health or the sickness of a member of his family requires his absence."[33] Such a law as this would materially improve the service of the jury if the judges would rigidly apply it.

8. Challenging of jurors.

There are generally two classes of challenges—one to the array of jurors and the other to individual jurors. The challenge to individual jurors is either peremptory or causal. The challenge to the array must be in writing before the jury is drawn, and sustained by affidavit. If the court on the hearing of evidence upholds the challenge the entire jury is dismissed. A challenge for cause to an individual juror is tried by court just as in the case of challenge to the array, but a peremptory challenge is made without assigning a reason.[34]

In Texas in capital cases, both the state and the defendant are permitted fifteen peremptory challenges. If there is more than one defendant, each has eight challenges and the

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[31] *Revised Statutes of Arizona*, 1913, Art. 3518.

[32] See McIlwaine's *Digest, Civil Statutes*, Art. 3185.

[33] *Revised Statutes of Arizona*, 1913, Art. 3524.

[34] McIlwaine's *Digest*, Arts. 3202-3209, *Civil Statutes*.

state has eight for each defendant.[35] There is no limit on the number of challenges for cause. The list of causes is so extensive that there is scarcely a reason that could not be made the basis of a challenge. There are fourteen causes listed. In Arizona each party to a case is allowed four peremptory challenges and there are only seven causes as the basis for challenge.[36] In Louisiana, the accused has twelve peremptory challenges and the state only six. There is no limit on challenges for cause.[37] In New Mexico in capital cases the defendant is permitted two additional peremptory challenges. In Oklahoma each party has three peremptory challenges.[39] In Arkansas, each party has three peremptory challenges in cases of misdemeanor while the state has ten and defendant twenty in felony cases.[40]

What is accomplished by challenge? Why do the states differ so widely in the number allowed and in the ratio of the number permitted the defendant and those allowed the state? Of course, the system of challenges intends to eliminate undesirable material from the jury. In so far as this is necessary it is a criticism on the method of selecting the jury, but it may serve in this connection as a wholesome check since it could not be expected that any method would work perfectly. There are other results not so desirable that flow from such a liberal system of challenges. It gives opportunity for the attorneys, especially for the defense, to reduce the jury to a set of tools to be used by the attorneys rather than the court. For every juror who is successfully challenged there is a chance to substitute one picked by the lawyer for the defense. Again, if the defendant has about twice as many challenges as the state, it gives the criminal the advantage. It is no wonder that the prosecuting attorneys for the state fail in convicting criminals before hand-picked juries in whose hands the problem of law en-

[35] McIlwaine's *Digest*, Art. 672.

[36] *Revised Statutes of Arizona*, 1913, Arts. 3557, 3558, 3560.

[37] *Statutes of Louisiana*, Art. 3947, Sec. 14.

[38] *New Mexico Statutes*, 1915, Art. 4446, Sec. 380.

[39] *Compiled Laws of Oklahoma*, 1900, Sec. 5790.

[40] *Digest of Arkansas Statutes*, Sec. 6381.

forcement primarily rests. The fact of the business is that the system reflects too largely the control of shyster lawyers who constitute the major part of the state bars and who have been very influential in state legislatures and constitutional conventions.

III. Proposals for restricting the use of the jury.

A. The balance of power should be restored to the judge by restricting the jury to its proper place in trial by jury. How may this balance be restored?

1. Instructions to jury.

At common law, the judge was not merely a referee in a game, periodically passing upon rules, but he really instructed the jury. He did not merely state the law in the case and leave the jury like Mohammed's coffin hanging in the air, but he was permitted to express an opinion on the evidence as the English judges and the federal judges in the United States do at the present time. The jury is always free to accept or reject the judge's opinion, but it certainly needs to know and is entitled to know what his opinion is. It certainly cannot be contended that it would be violating trial by jury and, therefore, unconstitutional for a judge to instruct the jury on both the law and the evidence.

2. The attaint and motion for a new trial.

If a verdict of a jury is against the evidence or false in fact, can it be set aside by attaint? It is constitutional for a judge to order a new trial on the ground that the verdict is against the evidence or that the damages are excessive or inadequate. The unforunate situation in this respect is that a popularly elected judge will only in the rarest instances exercise his constitutional right to reverse such a verdict.

3. Demurrer to evidence.

After the party having the burden of proof has introduced his evidence, the opposing party can demur, or admit the truth of the evidence. This leaves no question of fact before the jury and this takes the case from the jury. In a damage case the jury could be asked to assess the

damages. It is supported by precedent that a demurrer to evidence is not a constitutional violation of trial by jury.[41]

4. The special verdict.

The special verdict takes away from the jury the power to take the law into its own hands by rendering a general verdict on the combined law and facts. In many of the states, the court has statutory power to compel the jury to render a special verdict. In some states the court can compel the jury to make a special finding of facts in addition to its general verdict, and if the special findings are inconsistent with the general verdict, the court may disregard the general verdict and hold for the opposite party without ordering a new trial.

5. Direction of the verdict.

The directed verdict differs from the demurrer to the evidence in that the jury has to render a verdict, but has no discretion in the matter. When there is no question of fact about which reasonable minds can differ, then the court can direct the verdict. In some states in such instances, the court can dismiss the jury and enter a verdict without the concurrence of the jury.

6. Motion to strike out sham pleading.

If a party interposes a false pleading merely to delay the court, he has no right to go before the jury. Such a pleading is a sham pleading, and may be treated as a nullity by the opposite party for whom judgment is entered or he may ask the court to strike the pleading from the record. If there is no issue to try, then there is no violation of trial by jury by refusing to permit a party to subject the court to an illegal delay.

It is noticed by way of summary that constitutional guarantee of trial by jury does prevent determination of question of fact by less than twelve persons and a verdict not accepted by all the jurors, but these features may be changed by constitutional amendment. It also very properly eliminates partial or incompetent jurors and does not prohibit the use of any methods to effect a proper division of functions of court and jury.

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[41] *Hopkins v. Railroad*, 96 Tenn. 409; 34 S. W. 1029 (1896).

7. The grand jury should be abolished as a method of indictment in cases of misdemeanor, for at least three reasons: First, there is not enough involved in cases of misdemeanor to justify the expense. Why should twenty-three business men have to quit their business to indict a chicken thief?; secondly, the indictment can be made by information in such cases more efficiently, more expeditiously, and much more economically; thirdly, indictment by information would secure a great many more indictments than are made by grand juries. One of the difficulties in law enforcement is the fact that the grand juries are refusing to indict criminals. There can be no prosecution without indictment.

8. In civil matters the jury is least justifiable and least efficient because of the technical character of modern business relations and problems. The business man is intolerant of the delay caused by the use of the jury as well as he dislikes to trust complicated matter to the settlement of the jury. The use o fthe jury in civil matters should at least be left optional with the parties to the suit, and in case it is used, three-fourths of the jury concurring should be sufficient for a verdict. Some eminent students of jurisprudence advocate the total abolition of the jury in civil cases, contending that the courts of equity in England and the common law states in America have been and are the truest exponents of a scientific justice because they have not used the jury. Still others have advocated restricting the use of the jury to cases involving community interests where community policy may be involved.

IV. Proposals for the Improvement of the jury.

A. In civil cases if the jury is retained, the judge should submit special issues to the jury rather than deliver a general charge. The advantage of the special issue system are:

1. If the judge delivers a general charge to the jury on the law in the case and asks them to apply the law to the facts, he places a rather heavy burden on the jury. The principles of law are difficult for a layman to understand. The impossible should not be expected of a jury.

2. The general charge plan forces the jury to render a verdict while the submission of special issues requires the

jury to answer only the questions asked by the court. The court then renders its decision.

3. The special issue system simplifies the task of the jury and thus enables it to perform its task more efficiently, because after the judge has submitted the special issues the lawyers will argue these before the jury. The jury in this way is much more likely to understand these single propositions and to know how to answer them than to undertake to apply the law to the facts in an entire case and render a general verdict.

4. If a case tried on the basis of special issues is appealed the facts are in the record and there would be no need for the jury in the second trial to pass on the facts. This would be a saving of time and expense.

This system is now in vogue in Texas. A judge is compelled to submit the case to the jury on special issues if the parties to the suit request it, or he may on his own initiative submit the case on special issues if the parties do not object.

5. The judge should deliver his charge to the jury before the attorneys address the jury. The judge is supposed to represent justice while the attorneys represent their clients. The respect that the jury has for the judge causes them to consider very carefully what he has to say to them. His charge, therefore, anchors the jury and makes it capable of understanding more thoroughly the arguments of the attorneys.

6. Again there are too many people excused from jury service by law. Then there are too many excused by the judge. Finally, there are too many of those remaining eliminated from the jury by the system of challenges that prevails. All these loopholes should be restricted. There is no valid reason why one class of citizens should not do jury service as well as another. The judge should be much stricter in releasing people from jury service. Peremptory challenges should be restricted. Why should a juryman be eliminated without the cause being stated and tried?

7. The jury should be housed in more comfortaable quarters. It is a disgrace to state governments to imprison

the jurors in the black holes of Calcutta that now constitute the jury rooms of many of our county court houses.

8. Another medievalism is the locking up of the juries under the auspices of an officer of the court to keep anyone from talking to them or bribing them. Why not lock up the judge who tries the case or the attorneys who argue the case? Why entrust a man's property and life to a jury that cannot be trusted? This practice is a complete impeachment of the jury system. All these punitive features in the treatment of juries are methods of coercing them into hasty decisions. They are anachronisms and are as indefensible as a former statute of New Jersey which expressly provided that the jury "shall be kept together in the same convenient private place without meat, drink, fire, or lodging until they all agree upon a verdict."[42]

9. The jury undoubtedly is used more extensively than justice demands. Its use should in civil cases and in minor criminal cases be made optional with the litigants. This has been the practice in England since 1883, and is generally true throughout the Dominions. In cases of disagreement between the litigants, the court should be the judge.[43]

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[42] Allison's *Law*, 470.

[43] *Proceedings of the Academy of Political Science*, Vol. X, p. 190.

DIVISION OF LATIN-AMERICAN AFFAIRS

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PAN-AMERICAN CONFERENCES AND THEIR RESULTS

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The meeting of the Fifth International Conference of American States at Santiago, Chile, in 1923, brought a renewed interest in these gatherings as efforts toward the development of international concord. The four other meetings commonly known as Pan-American Conferences were held as follows: the first in Washington, October 2, 1889 to May 19, 1890; the second in the City of Mexico, October 22, 1901 to January 31, 1902; the third in Rio de Janeiro, July 23 to August 27, 1906; the fourth in Buenos Aires, July 12 to August 30, 1910.

In order to understand these conferences, however, it is necessary to realize that they were the successors to another series known as congresses called by Latin-American nations to consider more or less the same themes which the four later gatherings have faced.

The idea of American unity, after having been advocated by distinguished leaders of the days of independence such as Moreno, Monteagudo and San Martin of Argentina; Martinez and O'Higgins of Chile and del Valle of Central America found its first practical expression in Simon Bolivar who called the first congress to consider the question. This meeting was held in Panama from June 22 to July 15, 1826. Only Peru, Colombia, Central America, and Mexico were represented. The other Latin-American governments were either too busy with their own international problems or were afraid that the ambitions of Bolivar might convert the congress into an instrument for the realization of his personal ambitions. Ten sessions were held.

The principal result of the deliberations at Panama was a recommendation to the American governments that an assembly should be organized to meet every two years to:

1. Negotiate treaties to promote satisfactory relations between American countries.
2. Contribute to maintenance of peace among the American nations.
3. Forward the habit of conciliation among allied and foreign powers.
4. Offer its good offices to terminate wars.

Three other treaties were proposed, fixing closer rules concerning the meetings of the assembly, the contributions each state should make to a common army and navy, and lastly provisions for organization and movements of these armed forces. Alas, only Colombia approved the proposed agreement. As a Peruvian writer says: "There were platonic votes in an hour of grave dissension, noble ideals confronted by premature wars." Even Bolivar himself seemed to have lost confidence in the movement, before the meeting's adjournment.

The seeds planted by him were, however, destined to grow. Although this growth was slow, yet both North and Latin-Americans worked away through the years at the problems that his far-seeing vision had realized must be solved before the American republics could attain their rightful place in world leadership. While much is yet to be accomplished, at least the following are some of the items of Bolivar's Panama program that have been realized: abolition of slavery, settlement of most boundary disputes, standing together against European intrusion, building of the Panama Canal, the uniting of all American nations in the Pan-American Union, general treaties on arbitration.

The occasion for the calling of the next congress was the movement of Spain, encouraged by the Ecuadorian Juan Josê Flores, to reconquer her colonies on the Pacific.

This was called the "American Congress" and met at Lima from December 1, 1847 to March 10, 1848 on the initiative of the republics of Bolivia, Chile, Ecuador, Nueva

Granada and Peru. The fundamental ideas of this second assembly did not differ largely from those of the first: territorial integrity and political independence of the federated states; defensive alliance against aggression of foreign powers; unification of the rights of Americans; confirmation of agreements from 1810-1824 that fixed the frontiers of the new republics; solidarity in the repression of interior anarchy; defense of a democratic regime; abolition of slavery; and an ideal fraternity.

Bolivia, Chile, Ecuador, Nueva Granda and Peru sent delegates to the conference. These delegates recognized in the treaty signed February 8, 1848, that "The American Republics joined together by the principles of origin, language, religion and customs; by their geographical position; by the common cause which they had defended; by the analogy of their institutions; and, above all, by their common necessities and reciprocal interests cannot consider themselves except as parts of one and the same nation."

Unfortunately, the decisions of this "American Congress" met with little more enthusiasm in the various national governments than had those of the Panama gathering and its recommendations were not endorsed by them.

The expeditions of the North American filibusterer, Walker, against Central America led to the next movement for unity among the Spanish-American countries, which had now become fearful of the United States as well as of Europe. Peru, again leading, sent arms and money to her brothers in Central America and initiated a movement which resulted in the so-called "Continental Treaty" or Triple Alliance (*Pacto Tripartito*) which was signed September 15, 1856, in Santiago by the representatives of Peru, Ecuador and Chile. This treaty was more careful than previous ones to guard the rights of each country, to conserve its autonomy and the integrity of its territory. The securing of the signatures of the other Hispanic American countries was left to Peru.

The governments of Mexico, Nicaragua, Bolivia, Honduras, Colombia and Costa Rica either signed the Triple Alliance agreement or endorsed its ideas. Argentina challenged the whole assumption of the treaty, saying through

Minister Elisandre: "Independent America is a political entity that does not exist, nor is it possible to constitute it by diplomatic culminations."

But Peru continued her ardent support of the American ideal and in 1864 again invited the American nations to a new congress in order to give the continent "a peculiar form." The special occasion for the congress was the intervention of Spain in Santo Domingo and the intervention of France in Mexico.

This Second American Congress met in Lima, from November 14, 1864, to March 13, 1865. In its sessions, as also in those of the previous one, fears were expressed of the way the United States was working out its "Manifest Destiny" program. The congress was attended by many eminent men: Paz Soldan of Peru; Manuel Montt, founder of a political party and president of Chile; Antonio Leocadio Guzman, liberal politician of great influence in Venezuela; and finally, Sarmiento, leader of domocracy in Argentina. The danger from Spain gave a tragic prestige to the deliberations of this assembly. Those claims were unanimously rejected. As in the times of the great struggle for independence, the international cords that bound them together were strengthened and an alliance between Colombia, Peru, Ecuador, Venezuela, Salvador, Bolivia and Chile was formed convenanting to defend their own political life and national integrity. They agreed to compulsory arbitration and to reciprocal commercial, navigation and postal exchange. But the governments seem to have paid no more heed to this congress than to the previous ones at Panama and at Lima, since the proposals were not formally accepted by a single country.

Peru and Chile entered into an offensive and defensive treaty in 1865, because of the threat of Spain to reconquer her Pacific colonies. Ecuador and Bolivia later poined in the pact, which found a practical application when Spain did actually attempt to reconquer these countries, and they were called to a common defense of their sovereignty. On May 18, 1867, while still at war with Spain, a treaty was signed at Lima between Chile, Ecuador and Bolivia relating

to questions of international law. The unity of Central America was the object of many efforts during this period, as it has continued to be up to the present.

In 1888-1889 a very important congress on private international law was held at Montevideo. The invitations were issued jointly by Argentina and Uruguay, and, besides those two countries there were representatives from Bolivia, Chile, Brazil, Paraguay, and Peru present. The work done at this congress forms an important beginning for the later projects for the codification of American international law, which today is a live topic.

Equally important with these various conferences in showing the earnest desire of America for unity is the long list of authors and statesmen who have worked incessantly for this great idea. Vicuna Mackenna in his "Estudios Historicos" gives a list of thirty well-known publicists, along with their contributions to the subject.

The failure of the second Panama congress called by Colombia in 1881 seemed to finally convince even the most utopian of the Spanish-Americans that they had too many problems in their own separate countries to actually get together. They were ready therefore to try some other way. Everything pointed to the new way consisting in new leadership and in working toward a less rigid unity with a freer course for each separate country. So the second period set in under the leadership of the United States and the loosely organized Pan-American congresses, the first of which met in Washington in 1889.

The Civil War in the United States brought about in this country a decided change toward Hispanic America. The bravado of "Manifest Destiny" and the depreciation of the southern republics because of their frequent internal troubles were greatly reduced by our own experiences which almost disrupted our nation and left us considerably humbled.

The attention of the United States was again turned to South America by the war of the Pacific, with Chile on one side and Peru and Bolivia on the other, which continued from 1879 to 1881. In the latter year James G. Blaine

became Secretary of State. He held to the same ideas of American unity advocated by his distinguished predecessor, Henry Clay. Such a statesman had no trouble in realizing that the time had arrived for the United States to take the lead in the movement for continental solidarity. The United States Congress approved and the first International American Congress was called by the Secretary of State to meet in Washington in 1889.

The First Conference

The commercial aspect of Pan-American relations had been first discussed in the United States congress in 1884, when an act was passed creating a commission of three to make a careful study of commercial relations between the different American republics; and Secretary Frelinghuysen advocated a policy of reciprocity treaties with the Latin-American countries. Added to the commercial motives were those of a desire for peace among the American countries, as already pointed out. In his call Secretary Blaine was careful not to offend any or to assume any attitude of superiority.

That Secretary Blaine had not misjudged the opportuneness of the United States taking the lead in the movement of American congresses is indicated by the replies received as a result of the invitation, since several of the South American states expressed very deep appreciation of this step taken by the United States to bring America closer together.

The inaugural session was held October 2, with all the American states represented except Santo Domingo. The conference was divided into fifteen committees, which show the sphere of the discussions and subjects on which reports were rendered. Since these mark the program more or less of future conferences, they are given in detail here, as follows: (1) customs union, (2) monetary convention adopting a common silver coin, (3) arbitration, (4) uniform rules for preparation of commercial and civil documents, (5) extradition of criminals, (6) recognition of patents and trade marks, (7) banks and credits, (8) common sys-

tem of weights and measures, (9) railroad communication, (10) improvement of communication by the Atlantic Ocean, (11) improvement by the Pacific Ocean, (12) improvement of communication by Caribbean, (13) simplification of customs regulations, (14) unification of consular and other fees, (15) sanitary regulations.

After three months of deliberation, the committees began to make their reports. Some of these were adopted almost without debate. Others, which the Latin-American delegates feared implied a leaning toward the hegemony of the United States were debated at great length and at times with acrimony.

The resolutions and recommendations of the conference were very general since the territory was too new, the principle of co-operation untried and the questions too complicated to allow them to undertake the elaboration of definite projects for treaties or laws with any assurance as to their results. Also the mutual relations of the powers involved were not sufficiently well defined to allow for more definite treatment of the subjects under discussion.

Recommendations were made relating to practically all the subjects already mentioned. The most important of these were the following, which were to continue to occupy the attention of later conferences: sanitary regulations, Pan-American railway, patents, trade marks and copyrights, extradition of criminals, customs regulations, and inter-American co-operation in finance.

The most important definite result was the establishment of an International Bureau of American Republics in Washington, for the collection and publication of information relating to the commerce, products, laws, and customs of the countries represented. It was decided that it should operate under supervision of the Secretary of State of the United States. It was established in 1890 with an annual budget of $36,000 to be furnished by the different countries in proportion to their populations. This was the beginning of that most useful institution that is now known as the Pan-American Union. The conference also set up an inter-American railway commission which has continued to do good work.

The subject of arbitration occupied a large part of the conference's time, and a widely inclusive treaty was the only formal convention adopted by the conference. It provided for obligatory arbitration in all cases except where a nation's independence was involved. It also announced that in America all rights of conquest were denied. This matter of compulsory arbitration was to become the "eternal question" of the conferences, as it had been before in the first series of congresses. The delegates from Argentina and Peru pleaded most earnestly for the treaty, but those from Mexico and Chile were opposed to it.

Notwithstanding the high hopes inspired by the adoption of this convention, when it came to referring it to the various governments, as all the conventions of these conferences must be, it was found that not one of the governments was willing to sign it.

The Second Conference

President McKinley was favorable to the Pan-American movement but shortly after his accession to the presidency, the United States became involved in a war with Spain, during and after which it was doubtful as to what influence that war might exert on the relations between the United States and Spanish-America. But in his message of December 5, 1899, he suggested the holding of another Pan-American congress. The Mexican government, which under Diaz kept very close to the United States, extended the invitation for the second conference to all the American republics. On October 22, 1901, the conference opened its sessions in Mexico City, and continued in session until January 31, 1902. This is the only one of the five conferences held so far where representatives of all the American nations have been present.

The chief subject of discussion was obligatory arbitration. During the first few weeks of the sessions relations were somewhat strained, since Chile on account of her troubles with Peru over Tacna and Arica was ready to withdraw if the subject was brought up. Brazil also was

strongly opposed to the discussion on account of boundary questions pending with her western neighbors.

It was very difficult to get any form of statement that would satisfy all the delegates. The best solution, after much wrangling, was to get a majority of the delegations to sign a project whereby their countries should become parties to the Hague Conventions of 1899, which provide for voluntary arbitration. At the same time ten delegations signed a proposal for a treaty providing for compulsory arbitration. These represented Argentina, Bolivia, Guatemala, Mexico, Paraguay, Peru, Salvador, Santo Domingo, Uruguay and Venezuela.

The conference also approved a project for a treaty whereby controversies arising from a pecuniary claim of individuals of one country against the government of another should be submitted to the arbitration court established by the Hague Convention. This act may be considered as marking an important epoch in the advancement of international law. The conference requested the United States and Mexico to negotiate for the admission of the other American republics to the Hague Conference.

Questions of commercial policy again occupied the attention of the conference. Resolutions were adopted concerning the development of communications by sea and by land, especially through the construction of the Pan-American railway, the simplification of customs and harbor regulations, the exchange of full reports concerning trade and industry, and the improvement of the sanitary service in the ports. The idea of a Pan-American bank also received the support of the conference. In spite of the failure of the first conference in regard to commercial treaties, much was done at the second gathering to eliminate petty impediments to commerce by the following: Uniform regulations for the entry, dispatch and clearance of vessels and simplification of manifests and invoices; adoption of a simple and uniform system for declarations of merchandise forwarded in postal parcles; the facilitation of the transit of goods; the simplification of charges collected from merchant vessels, and of formalities respecting the entry, clearance, loading and un-

loading of ships. The second conference further resolved that there should be called, within a year from its adjournment a customs congress of the American republics, which was to take under consideration the various recommendations made by the Pan-American conference. There was proposed the organization of a permanent customs commission, who were to compare and study the customs and tariff laws of the nations of America, in order to suggest measures which might simplify customhouse formalities and facilitate mercantile traffic.

In reference to the international railway it was shown that on the basis of surveys made in the year 1899, the estimated cost of the fifty-four hundred miles yet to be constructed was $174,000,000 in gold. The conference voted to carry on the investigations and propaganda already begun under a commission of five members. Such a commission was immediately appointed consisting of two North Americans and of three diplomatic representatives of other republics at Washington.

Besides the two treaties on arbitration and the various informal actions referred to above there were seven other treaties agreed upon as follows:

First, codification of public and private international law. This treaty empowered the governing board of the Bureau of American Republics to nominate a commission of five American and two European jurists to codify American international law and to submit the same to the American governments for their approval, with the idea that this would finally become binding on American states.

Second, the extradition of criminals. This treaty included the crimes of anarchistic plotting and agitation, based on the treaties already in force between the United States, Argentina, and Mexico.

Third, the practice of learned professions. This provided for the recognition of professional titles of one country by all the other American countries, providing these are duly certified by the Ministry of Foreign Affairs of the country in which the privilege is sought.

Fourth, patents, and trade marks; by which the citizen of each of the American states was guaranteed the same

rights of patents and trade marks as the nationals enjoy, if he followed the same rules in registering his product.

Fifth, copyright and literary property, giving the author of a work, the exclusive privilege of selling or granting translation rights for his work in all the other countries with which his own government has signed this treaty.

Sixth, rights of aliens. This treaty stated that aliens were not to be considered as having any rights that were not granted to nationals and that damages sustained through the action of rebels were not chargeable to the government, unless this latter had failed to comply with its duty, and further that aliens could not make claims through diplomatic channels for such losses, unless there was an evident denial of justice or violation of international law. The United States did not sign this convention as it did not sign the one on patents and trade marks.

Seventh, exchange of documents, providing for the exchange between all the American governments of their official publications, which should be kept on file for the public use.

Results of Second Conference

The Mexico conference advanced far beyond the former gatherings in promoting inter-American relations. It showed the possibility of discussing in a frank and friendly way the varied interests of the different countries and the power to co-operate in a number of important matters. Because of a lack of detailed preparatory work, the conference could not enter upon a thorough discussion of the technical side of a number of important questions but, on the other hand, there had been developed by this time a far greater feeling of security, of mutual understanding, and of community of interest than had been the case at Washington. This was apparent from the fact that a large number of treaty projects were adopted. Some of the resolutions were indeed of such general and self-evident character that their promulgation was not due so much to a desire for practical action as to a wish of the conference to tide over certain difficulties and at least, apparently to achieve defi-

nite results in matters where the public was not willing to be disappointed.

When we turn to the reports of the delegates of the various countries at the third conference to find which of the treaties agreed upon at Mexico had been ratified by the governments concerned, we are disappointed. The various American countries had adhered to the Hague Convention on arbitration, and by the suggestion of the United States and Mexico they had all been admitted to the Hague Convention. But this might easily have been accomplished without the recommendation of the Mexico conference. The treaty for the settlement of pecuniary claims was made binding by the following five states ratifying the same, United States, Guatemala, Honduras, Salvador and Peru. Obligatory arbitration was accepted by the following: Salvador, Guatemala, Honduras, Mexico, Uruguay, Peru, Dominican Republic. The extradition treaty was ratified by Costa Rica, Honduras, Guatemala and Salvador. The convention concerning learned professions had been adopted by Peru, Bolivia, and the five Central American countries. So that at the time of the meeting of the Third Conference the United States had adopted only one treaty, Mexico two, and Argentina, Brazil and Chile none. Acting under a resolution of the Mexican conference the first American customs congress met New York in January, 1903, but with small results, due to lack of preparation.

The Third Conference

This was held at Rio de Janeiro, July 21-August 25, 1906. The United States and all the Latin-American countries, with the exceptions of Haiti and Venezuela, were represented. The conference met in Monroe Palace under most auspicious circumstances, since it had behind it the long record of peace and good will between Brazil and the United States. A notable contribution to this conference was the address of Elihu Root, then secretary of state of the United States, who was at the time making his memorable visit to South America.

This conference, as it reviewed the few acts of the past conferences that had been actually adopted by the American governments, decided to pass by some of the more general and idealistic questions and direct its attention to certain specific ones.

The program had been prepared with greater care, and data on which conclusions could be based had been gathered with more care than formerly. The diplomatic correspondence on this matter forms interesting reading. Peru had insisted that in spite of the objections of Chile, there be discussed the subject of arbitration, which, according to Minister Pardo, "is the subject most interesting to the people of this continent because it is the only solid basis on which can rest the understandings and treaties which tend to encourage the political and commercial relations of the American republics."

Haiti desired that the United States define clearly at the conference the Monroe Doctrine in order to dissipate the fears of possible annexation at some future time of Caribbean countries. Argentina requested the discussion of and reference to the next Hague Conference of "whether or if all all to what extent the use of force for the collection of public debts is admissible." (The Drago Doctrine). Chile and several other countries pointed out the necessity of declaring again at the third conference in favor of the important actions of the second conference, and urging the various governments, to adopt the same. The United States recommended the extension for five years more of the time given for signature of the treaty of arbitration for pecuniary claims agreed upon at the Mexican conference.

As foreseen in the preparation of the program the most difficult subject which the Rio de Janeiro conference faced was arbitration. Chile especially was in favor of confining the action of the third conference to a reaffirmation of the action taken by the second conference. In fact she had said that the action of the Mexico conference was as far as the American governments could go and therefore there was no reason for the discussion of arbitration at Rio de Janeiro. Being overruled, however, she and Brazil, since

they had certain differences with other governments pending, united in opposing any advanced declaration on arbitration. As at the Mexican conference, this created a crisis in the conference's deliberation. The following resolution was finally passed:

> Whereas they have been invited to the next Hague Convention, the Third International Conference of the American states assembled in Rio de Janeiro, resolves:
>
> To ratify adherence to the principles of arbitration, and to the end that so high a purpose may be rendered practicable, to recommend to the nations represented at this conference that instructions be given their delegates to the second conference to be held at The Hague to endeavor to secure by said assembly of world-wide character the celebration of a general arbitration convention so effective and definite that, meriting the approval of the civilized world, it shall be accepted and put in force by every nation.

The Mexican Conference Treaty Covering the Arbitration of Pecuniary Claims

There was considerable discussion in the committee regarding the program proposal to recommend an extension of this treaty for a further period of five years. With this marked difference of opinion in the committee, it took some time to reach a form of report acceptable to the minority and one that satisfied the majority, but this was finally secured and the extension of the treaty with slight alterations unanimously recommended by the conference.

The Forcible Collection of Public Debts

This subject as embodied in the program "that the Second Peace Conference at The Hague be requested to consider whether and, if at all to what extent, the use of force for the collection of public debts is admissible," overshadowed in interest all other topics before the conference. Several months before the conference the press of both this continent and of the Old World discussed the probable action

the conference at Rio de Janeiro would take in the subject, the general belief being expressed that it would take advanced and decided ground against the use of force for the collection of public debts.

Doctor Drago's views, as set out in his note of December, 1902, were evidently misconstrued by many of his critics, who thought they saw in them an effort to excuse the nonpayment of just obligations on the part of a nation. In the discussion which took place in the committee room in Rio de Janeiro it was early made clear that this criticism was not only wholly unfair to Doctor Drago, but was keenly felt by the smaller debtor republics. Doctor Drago referred to the Venezuela incidents which formed the subject of his note of December, 1902, and said: "At a critical moment the Argentine Republic proclaimed the impropriety of the forcible collection of public debts by European nations, not as an abstract principle of academic value or as a legal rule of universal application outside of this continent (which it is not incumbent on us to maintain), but as a principle of American diplomacy which, whilst being founded on equity and justice, has for its exclusive object to spare the peoples of this continent the calamities of conquest disguised under the mask of financial interventions, in the same way as the traditional policy of the United States, without accentuating superiority or seeking preponderance, condemned the oppression of the nations of this part of the world and the control of their destinies by the great powers of Europe."

The subject was indeed deemed so delicate by some members of the committee, and in their opinion susceptible of so much unjust criticism, that they were inclined to favor a recommendation to the conference that no action whatever be taken on the topic, but finally a unanimous report was presented as follows:

> Resolved, by the Third International Conference of the American States, assembled in Rio de Janeiro:
>
> To recommend to the governments represented therein that they consider the point of inviting the Second Peace Conference at The Hague to consider the question of the compulsory collection of public

debts, and in general, means tending to diminish between nations conflicts having an exclusively pecuniary origin.

This action on the part of the conference leaves to each of the republics the opportunity to either bring the subject to the attention of The Hague Conference in connection with the program for the conference, or not, as each may deem best at the time.

Codification of International Law

A convention was signed at the Mexican conference providing for the appointment by the governing board of the Bureau of American Republics of a commission of five jurists to prepare a draft of a code of public and private international law, to be submitted to the Rio conference for its actions.

The consideration given this convention by the different governments that participated in that conference apparently led them to the conclusion that the moment to attempt such a general codification as contemplated by the convention had not arrived, and as a result the convention signed at the Mexican conference was not ratified by any of the signatory countries. Notwithstanding this fact there was, however, a very general feeling manifest in the conference at Rio de Janeiro that a first step toward a more definite formulation of the rules of public and private international law for use between the American States than at present existed, could and should be taken.

The plan adopted by the conference recommended that a special committee should be appointed to consider the desirability of directing attention to those rules and principles of international law which have been incorporated in treaties or conventions between two or more of the American Republics since it was not expected that a draft of a systematic code of international law could be at once prepared. In the event the commission is created and this work done, it will be the task of the fourth conference to consider the report of the commission and try to secure

thereafter, so far as may be deemed practicable, the acceptance of such rules by the republics represented in the conference.

Naturalization

A resolution was presented to the conference embodying the principle that when a citizen, a native of one country and naturalized in another, shall again take up his residence in his native land without the intention of returning to the country in which he has been naturalized, he will be considered as having reassumed his original citizenship and as having renounced the citizenship acquired by naturalization.

Copyrights, Patents and Trade Marks

The action of the conference in these matters with the exception of certain modifications, was the reaffirmation of the convention of the Mexican conference respecting rights in intellectual and industrial property. It was felt that unless uniformity, expedition, and cheapness could be obtained in connection with the registration of copyrights, patents and trademarks, little actual good would result. The modified Mexican convention provides that the whole administrative work in connection with the subject shall be lodged in two bureaus—one to be maintained at Havana for the states of Colombia, Costa Rica, Cuba, Guatemala, Honduras, Mexico, Nicaragua, Panama, Santo Domingo, San Salvador, the United States, and Venezuela, and the other at Rio de Janeiro for the Argentine Republic, Brazil, Chile, Ecuador, Paraguay, Peru, and Uruguay.

The request that each American government form a special commission to work with the minister of foreign affairs to secure the approval of the resolution passed by the conferences and to promote the general development of friendly understanding between the American countries was of great importance. It showed that the conference at Rio de Janeiro was desirous of making its work effective and having the various governments take seriously its resolutions.

The International Bureau of American Republics

The reorganization of the Bureau of American Republics was an important result of the gathering. Since Mr. Andrew Carnegie had made available funds for the construction of a building for the Bureau it was possible for the conference to work out a more practical program for this organization. The Bureau was made responsible for the following up of the actions of the inter-American conference through the individual governments and pressing for the ratifications of its conventions, and was changed from simply an office to collect commercial information into an executive organ of the international conferences.

The conference outlined the following duties for the Bureau:

1. To compile and distribute commercial information and prepare commercial reports for publication.
2. To compile and classify for the use of succeeding conferences all available data appertaining to treaties and conventions between the American Republics and between the latter and non-American states.
3. To report to succeeding conferences on educational matters.
4. To prepare reports on questions assigned by resolution of the Rio de Janeiro and of succeeding American conferences.
5. To assist, so far as may be proper, in obtaining the ratification of the resolutions and conventions adopted by conferences in which the different republics participated.
6. To carry into effect resolutions of the American international conferences referred to the Bureau for execution.
7. To recommend subjects to be considered by the next conference, these to be communicated to the governments participating at least six months before the date of the meeting of the conference.
8. To submit within the same period to the various governments connected with the Bureau a complete report of the work of the Bureau since the meeting of the last con-

ference, and special reports on subjects which may have been referred to it.

9. To keep the records of the proceedings of the international American conferences held and of the action taken by the different republics on the recommendations of the conference.

Through the new functions thus assigned the Bureau, it becomes in reality a "permanent committee of the international American conference." The greatest difficulties met with by each of the three conferences that have been held has been the lack of adequate information and carefully compiled data covering subjects included in the program of the conference. As a "permanent committee" the Bureau is not only intrusted with the duty of recommending the inclusion of definite topics in the program for that conference, but of submitting to the participating governments for the consideration of their delegations detailed reports and data covering such tentative projects, and also with that of preparing accurate and complete data concerning subjects specifically referred to it for such action by former conferences.

The Rio de Janeiro conference adopted conventions concerning pecuniary claims, naturalized citizens, patents and trade marks, codification of international law and the two subjects of general arbitration and forcible collection of debts referred to The Hague Conference, the re-emphasis on exchanges of privileges in practice of learned professions, reorganization of the Bureau of American Republics and the request that each government name a special Pan-American committee and the creation of a sanitary center in Montevideo. It also passed resolutions on the following: Pan-American railway, means of improving commercial relations and steamship connections, request that each government prepare for the next conference a study on its monetary system, holding of a conference on coffee production, and the program and date of the next Pan-American conference.

The treaties adopted by the Rio conference received much larger attention from the governments than had

those of the two previous conferences. At the time of the meeting of the fourth conference the treaty concerning naturalization was ratified by twelve states and several special agreements had been made by others involving the same principles. As to arbitration of pecuniary claims, twelve states ratified the Rio agreement, which was the same as the one at the Mexico conference, and several states also concluded general arbitration treaties, which included the subject of pecuniary claims. The United States made arbitration treaties in 1908 and 1909 with most of the Latin-American countries, including Mexico, Peru, Salvador, Costa Rica, Ecuador, and Haiti. Some of the other inter-American treaties were Argentina with Paraguay, Chile, Bolivia, and Brazil; Bolivia with Peru; Brazil with Venezuela; and Colombia with Peru. The convention setting up a commission to codify American international law was ratified by fourteen states, although this commission did not meet until 1912 in Rio de Janeiro. The convention concerning patents and trade marks was ratified by eight states.

It should be borne in mind, in calculating the results of these conferences that while their specific treaties are not always adopted by the various nations, these principles have been often embodied in international legislation of the various American countries. And certainly these conferences have served to give all the American stafes a more comprehensive view of the great international problems which America and the rest of the world are facing.

The Fourth Conference

The Fourth International Conference met at Buenos Aires on July 12, 1910. The honorary presidents were the secretaries of state of the United States, and of Argentina. The active president was Dr. Antonio Bermejo, the chief justice of the supreme court of Argentina; and the Argentine minister in Washington, Señor Epifanio Portela, was secretary-general. The fact that the conference met in the same year that most of the Latin-American governments

were celebrating the centenary of their independence from Spain added new zest to that celebration. In accordance with the precedent established at Rio de Janeiro, the work of the conference was based entirely upon a program previously adopted by the governing board of the Pan-American Union.

An important ruling provided that subjects not included in the agenda should not be introduced unless there was a favorable vote of two-thirds of the members. This regulation resulted in a sharp discussion. But many of the delegations took the position that it was not desirable that new business should be introduced at all and the ruling was retained. It was pointed out that a country wishing to bring before the conference any subject may in due time propose its discussion and ask for its inclusion in the program; and that as such conferences are not composed of legislators acting on their own responsibility, but of delegates ruled by the instructions of their governments, it is necessary that the program of subjects to be discussed should be known before hand by all the governments, in order that they may study them and give instructions thereon to their representatives.

The temporary break in diplomatic relations between Bolivia and Argentina at the time of the Buenos Aires Conference brought to the fore the important question concerning the effect of the admission to a conference of delegates of a government not yet recognized by all the members of the union. Precedents have been established which appear to justify the principle that membership in a union and participation in its administrative and deliberative business does not involve the recognition by every participant state of the legality or independence of every other government represented.

The organization of the Pan-American Union was considered very carefully and the committee considered the advisability of converting into a formal convention the resolution passed and continued by successive conferences under which the Bureau of American Republics had hitherto been maintained. But many delegates believed that the ratifica-

tion of such a convention would take an indefinite time on account of the constitutional provisions in numerous republics which require the submission of treaties to one or both houses of the legislature. The final decision on this point was referred to the following conference.

After considerable hestitation the rule was retained which made the secretary of state of the United States of America the permanent president of the governing board of the Pan-American Union, although indications had been made by the delegates of some countries that it would be more in accordance with the equal dignity of all the members in the Union if the chairmanship of the board were made elective. In order to acknowledge more clearly the dignity of such an international institution, the name of the Bureau was changed to "Pan-American Union." The name of the organization of American countries which supports the Bureau was changed to that of "Union of American Republics." The functions of the Pan-American Union were not essentially modified. It was decided that it would be desirable for the Union to gather and publish information on the current legislative acts of the American republics. The position of the Union as the permanent commission or agent of the international American conferences was emphasized.

The following are the important functions of the Pan-American Union as defined by the fourth conference: (1) to compile and distribute data and information relative to commerce, industry, agriculture, education, and general progress in the American countries; (2) to collect and classify all information respecting treaties and conventions between the American republics and between these and other states, as well as concerning the legislation in force in them; (3) to contribute to the development of commerce and intellectual relations between the American republics; and to their more intimate mutual knowledge; (4) to act as permanent commission of the international American conferences, to keep their archives, to assist in obtaining the ratification of the resolutions and conventions adopted, to study or initiate projects to be included in the program of the conferences, to communicate them to the different governments

of the Union, and to formulate the program and regulations of each successive conference; (5) to present to the various governments, before the meeting of each conference, a report upon the work accomplished by the institution since the close of the last conference, as well as separate reports concerning the matters referred to the Union. It is also again recommended that there shall be created in each one of the republics a Pan-American commission, dependent upon the the ministry of foreign affairs and composed, as far as possible, of former delegates to an international American conference. It shall be their function (a) to assist in securing the approbation and ratification of resolutions and conventions adopted by the conference; (b) to furnish to the Pan-American Union all the data which it may require in the preparation of its works; (c) to present, by their own initiative, projects which they may judge appropriate to the purpose of the Union.

The program of this conference was much more limited than had been its predecessors. The consideration of the renewal of the treaty concerning the arbitration of the pecuniary claims was one of the most important questions. The treaty concluded in Mexico and renewed at the conference at Rio de Janeiro had been ratified by twelve American states. The convention adopted by the fourth conference retained the first article of the treaty of Mexico, which provides for the submission to arbitration of all pecuniary claims which cannot be adjusted amicably through diplomacy and which are sufficiently large to warrant the expense of arbitration. To this article there was added the clause that "the decision shall be given in conformity to the principles of international law." The treaty allows the alternative of submitting the respective claims to the Permanent Court of The Hague.

Three treaties adopted by the fourth conference deal with the important subjects of copyrights, patents and inventions, and trade marks. In all these matters the conference followed the precedent of other international agreements on the subject. The essence of the convention on literary and artistic property is contained in Article 3, which provides

that "the recognition of a right of literary property obtained in one state, in conformity with its laws, shall be of full effect in all the others, without the necessity of fulfilling any further formality, whenever there appears in the work some statement indicating the reservation of the property right." The result of the provision is that each country gives to the literary property originating in other treaty states the same protection which it accords to its own citizens, but that, on the other hand, no country can claim for its citizens a longer term of protection than is granted by its own legislation. It was provided that "every citizen of each of the signatory states shall enjoy in each of the other states all the advantages conceded by their respective laws relative to patents and inventions, designs and industrial models. In consequence they shall have the same protection and legal remedies against every attack upon their rights, being bound, however, to comply with the formalities and conditions imposed by the internal legislation of each state." A detailed convention was adopted concerning trade marks.

The instructions issued by the department of state to the United States delegation dwelt upon the hindrances of trade which result from the lack of uniformity in such matters as consular fees, the forms of invoices and manifests, and other features of consular and customs administration and suggested the adoption of a uniform invoice for all shipments from one republic to another, and a uniform method of consular certification. After a good deal of discussion a resolution regarding customs regulations was adopted.

The resolution on the subject of sanitary police was voted recommending to the countries which have not yet ratified it, the adoption of the international sanitary convention of Washington.

There were other resolutions adopted by the conference which dealt with matters of commercial and intellectual interests, such as the construction of the Pan-American Railway, the establishment of more efficient steamship service between the American republics, the convening of a coffee congress, the celebration of the opening of the Pan-

ama Canal, the interchange of university professors and students, and the proceedings of the Pan-American scientific congress.

The committees during the Buenos Aires conference were given time and opportunity for a thorough discussion of their respective subjects. The conference proceeded in a most business-like way.

One of the most interesting happenings in the conference related to the discussion concerning the Monroe Doctrine which was carried on privately between several delegations but never brought on the floor of the conference itself. Since it is an interesting side light on our general subject as well as on the workings of these conferences, we will follow the discussion as reported by the Chilean diplomat, Alejandro Alvarez. It seems that the late Ambassador of Brazil to the United States, his excellency Señor Joaquin Nabuco, had cherished the idea of presenting to the conference at Buenos Aires a motion which would register the recognition by all the countries of America of the fact that the Monroe Doctrine had been beneficial to them. Nabuco, at his death, had left in writing a formal declaration, which the government of Brazil, out of respect to the memory of the great statesman, desired to have presented to the conference without change. His Excellency, Señor Da Gama, Brazilian ambassador to Argentina, presented the matter previously to Argentina and Chile, saying that his government was desirous of counting in this move on the co-operation of Argentina and Chile. The proposition, furthermore, was to be presented only in case the acquiescence of all the other delegations could be counted on beforehand, so that it would be approved without criticism.

The resolution of Nabuco, endorsed by the Brazilian delegation, was in these words: "The long period which has transpired since the declaration of the Monroe Doctrine permits us to recognize in it a permanent factor making for international peace upon the American continent. For this reason, while celebrating the centenary of her first efforts towards independence, Latin-America sends to her Great Sister Nation of the North, an expression of her thanks for

that noble and unselfish action which has been of so great benefit to the entire New World."

Chile did not feel, however, that she could endorse such a resolution, and proposed the following as a substitute:

> Since their independence the nations of America have proclaimed the right thereby acquired by excluding European intervention in their internal affairs, and, also, the principle that the territory of the New World cannot be made the object of future colonization. These principles, clearly formulated and solemnly expressed by President Monroe in 1823, constitute a factor which has contributed towards guaranteeing the sovereignty of the nations of this continent. Wherefore Latin-America, celebrating the one hundredth anniversary of her independence, sends now to the Great Sister Nation of the North the expression of her adhesion to that idea of solidarity, as in the past she joined her in proclaiming those principles and upholding them for the benefit of the entire New World.

Señor Alvarez of Chile and Señor Da Gama of Brazil then got together and agreed on the following compromise resolution:

> The long period which has transpired since the declaration of the Monroe Doctrine permits us to recognize in it a permanent factor making for external peace upon the American continent. It gave concrete and solemn expression to the aims of Latin-America from the commencement of her political independence. For this reason, while celebrating the centennial of their first efforts towards independence, the nations represented in the Fourth Pan-American Conference send to their Great Sister Nation of the North the expression of their adhesion to that noble and unselfish action, of such beneficial consequence for the New World.

This was presented to the delegations of Argentina (all but two members of which approved it as drawn up) and Chile, the members of which believed that another formula

must be sought which would not lend itself to false interpretations by Europe, the United States and the rest of America. Their proposal was in the following terms:

> Upon celebrating the centennial of their first efforts towards political independence the nations represented in the Fourth Pan-American Conference send to their Great Sister Nation of the North the expression of their thanks, and record the conviction that the declarations contained in the message of President Monroe meant the aims of all America and contributed effectively to guarantee its independence.

By now the situation was complicated. The delegation of the United States, consulted in regard to the whole matter, made it clear that while it would be very acceptable for Latin-America to make the Monroe Doctrine hers, if in doing this she was going to create dissensions in the assembly it was preferable to make no presentation of the subject at all. The Brazilian delegation thus realized that a unanimous assent to its views was not easy to obtain; for though every one agreed as to the basic factors of the resolution it was very difficult to reduce it to a brief form satisfactory to everybody. In view of this the delegation did not further push its project.

So, while all the countries of America there represented were agreed that the Monroe Doctrine, as it was formulated in 1823, is in accord with the aims of the New World and forms a part of its public law, yet it was very difficult to find a wording, which, without exciting the susceptibility of Europe, would be satisfactory to all the countries of America. There were some states which desired to see incorporated with the principles of that doctrine other principles limiting the hegemony of the United States.

General Conclusions

Such conferences as those held in Washington, Mexico, Rio de Janeiro, and Buenos Aires have not secured much greater results than the series formerly held in South

America. But the fact that the Pan-American Union exists and has the opportunity to do a really constructive work means that, as the American nations grow to realize their community of interests, the importance of its services and the weight of its decisions will increase and it will form a stronger bond among the American states. As Don Alejandro Alvarez says: "The happiest results of the Pan-American conferences are that they harmonize all the states of America and that they contribute powerfully in developing and forming upon its true basis the American conscience, a conscience which is one of the characteristics of the contemporary political life of the states of the New World."

Dr. Ernesto Quesada, of the University of Buenos Aires, says concerning the results of the Pan-American conferences the following: "Up until the present the Pan-American movement is in an academic state and has not entered into the realm of the practical: economic and general subjects are principally discussed, excluding more and more rigorously political questions; but the interests which it is desired to harmonize are so complex that satisfaction is very difficult; it is more desirable to proceed slowly in order not to precipitate modifications which might result in danger. So the only representative thing in Pan-American diplomacy up to the present is the closer association of men and better reciprocal understanding of countries. . . . Of course, from the diplomatic point of view the composition of the Pan-American Union gives to the United States an absolute majority because the representatives of the republics under the protectorate of the United States have a full vote, such as Cuba, Panama, Haiti, Nicaragua, Santo Domingo and the list will possibly grow in the future. Thus the hegemony of the United States in the meeting of the Pan-American Union is evident, as it is also in the conferences periodically held."

Likewise, Secretary of State Root, in his instructions to the United States delegates to the third conference said: "It is important that you should keep in mind and, as occasion serves, impress upon your colleagues that such a con-

ference is not an agency for compulsion or a tribunal for adjudication; it is not designed to compel states to make treaties or to observe treaties; it should not sit in judgment upon the conduct of any state, or undertake to redress alleged wrongs; or to settle controverted questions of right. A successful attempt to give such a character to the conference would necessarily be fatal to the conference itself; for few, if any, of the states represented in it would be willing to submit their sovereignty to the supervision which would be exercised by a body thus arrogating to itself supreme and indefinite powers. The true function of such a conference is to deal with matters of common interest which are not really subjects of controversy, but upon which comparison of views and friendly discussion may smooth away differences of detail, develop substantial agreement, and lead to co-operation along common lines for the attainment of objects which all really desire."

The Fifth Conference of American States that met in Santiago, Chile, on March 25, 1923, faced a very different world from that of 1910. The World War and the establishment of the League of Nations brought a new set of problems before the Santiago gathering. The agenda adopted shows that the governments recognize that they must face a much more inclusive lot of questions than were indicated in the above quoted words of Mr. Root, uttered before the supreme need of a permanent machinery for settling disputes and developing co-operation between nations was so keenly felt as it is today. In the next number of this *Quarterly*, the way the Santiago conference met these enlarged problems will be discussed.

NEWS AND NOTES

AUGUST—OCTOBER, 1923

ARGENTINA.—On June 17 President Alvear asked authority from congress to modernize the navy. In submitting his request the president pointed out that Great Britain, the United States, and Brazil were at present engaged in improving their navies, while Chile had added a new battle ship last year. This request was to be followed in October by another for an appropriation of 155,000,000 pesos for military purposes. The criticism voiced by the Brazilian press was answered by referring to the respective positions of the Argentine and Brazilian governments on the question of disarmament at the fifth Pan-American conference.

The government has been authorized to pay the League of Nations Council the total of the quotas allotted to Argentina since 1920. This is in accordance with the present policy of supporting the League of Nations.

The general progress of the country, the increase of its population, the increase of wealth, and other factors, in the eyes of the president have made it imperative that the immigration law, now forty-seven old, be reformed in some way to provide for a more careful selection of immigrants.

A national economic conference composed of representatives of public institutions, delegates from associations belonging to the Argentine confederation of commerce and of other organizations convened at Buenos Aires on July 1, 1923.

On April 21, 1923, the president signed a decree extending the operation of the rent law to September 1, 1923. As originally passed, the law extended contracts for the rental of houses, apartments, and rooms for a period of one and one-half years, during which time the rates charged might not be changed.

The budget law for 1923 makes provision for a minimum wage.

BOLIVIA.—The minister of public instruction and agriculture plans to establish a system of government farm advisors with headquarters in the capital of each department.

BRAZIL.—A national labor council, consisting of twelve members appointed by the president, of whom two are to be officials in the ministry of agriculture, two workmen, two employers, and the other six men of recognized authority on social questions, has been authorized to study labor problems, to outline labor legislation, and to superintendent the application of labor laws.

The report of the minister of finance indicates that the budget for 1924 will show a net deficit of 238,452 contos of reis paper. The

revenue is estimated at 1,170,005 contos of reis, the surplus at 38,344 and expenditures at 1,408,475.

Decree No. 16009 of April 11, 1923, created a national council of commerce and industry to act as a consulting body in commercial and industrial subjects. The council is to have thirty-six members drawn from the ranks of governmental officials and from members of commercial, financial, and industrial organizations.

By an exchange of notes under date of October 18, Brazil and the United States accorded each other unconditional most-favored-nation treatment in custom matters.

CHILE.—The new cabinet which took office on July 1, consists of the following: Domingo Annunategui Solar, Premier and Minister of the Interior; Emilio Bello, Foreign Affairs; Alcibiades Roland, Justice; Guillermo Subercaseaux, Finance; General Luis Altamirano, War; Francisco Mardones, Public Works.

The government acting under authority from congress has adhered to the agreements reached by the international postal convention held in Madrid in 1920.

By mutual agreement Peru and Chile have extended the date for the presentation of data relating to the Tacna-Arica controversy from September 13 to November 13.

COLOMBIA.—A financial panic was narrowly averted by the use of the payments by the United States for the establishment of a new national bank recommended by the commission of American economists, which recently spent seven months studying the economic conditions of Colombia. Several of the largest Colombia banks had already suspended payments before the plans had been matured. These resumed operation the day following the government's announcement of the creation of the new bank.

COSTA RICA.—The population of Costa Rica on December 31, 1922, as given by the recent census, was 485,449.

According to the message of the president read before congress on May 1, 1923, revenues for 1922 exceeded expenditures by 1,620,881 colones.

The treaty of extradition between Costa Rica and the United States signed November 10, 1922, was ratified on March 6, 1923.

CUBA.—The introduction in the Cuban house of representatives of a bill by Colonel Tarafa providing for the consolidation of certain Cuban railroads resulted in considerable agitation both in Cuba and in the United States. As originally introduced the bill provided that any three of the existing railroads in Cuba operating a total of four hundred kilometers of railroad lines, the ownership of two of these to be Cuban, might consolidate. The house of representatives re-

ceived the bill at four o'clock on the afternoon of August 10, and passed it at four o'clock on the following morning. This gave rise to a charge of secrecy in the passage of the bill, especially in view of the fact that there was only one copy of the bill in the house of representatives at the time. As soon as the action of the house was made public, two divergent interests became apparent. The principal railroad interests favored the proposed legislation, while the sugar interests were almost unanimously opposed to it. As approximately 85% of the total capital invested both in the railroads and in the sugar refineries and plantations was American, Washington was soon informed of the difficulty inherent in the situation.

The chief provisions of the bill in addition to the one mentioned above, were those designating some twenty-five ports as national ports and confining import and exports trade to these. Private ports which had been established by sugar refining companies to the number of forty-seven, were deprived of their right of handling international commerce. Provision was made for the utilization of the consolidated lines in the transportation of sugar from the refineries to the national ports. Until access to the national ports was made available through the consolidated lines, manufacturers might utilize the private ports upon the payment of a certain tax, which the persons affected maintained was sufficient to compel them to abandon their ports. Infractions of the law were to be punished by a fine of $1,000 for the first offense and a fine of twice that amount plus confiscation of the merchandise in case of the second and recurring offenses.

The advantages claimed for the bill by its proponents were that no real ports were to be closed by the measure, the only places affected being mere private piers adjacent to certain sugar lands; that the continuance of the present situation would render impossible any economic development of Cuba based on the existence of a foreign trade; that the tax imposed on sugar exported from private ports woul damount to only approximately five cents a bag, and would be in the nature of tax on privilege; that the consolidation would bring about á reduction of railroad rates, and tend toward the economic development of the country; and that the abolition of private ports would make possible an enforcement of Cuban immigration laws, which at present can hardly be enforced due to the tampering with officials at the private ports. Opposition to the measure centered around the following points as presented in a protest by the Rotary Club of Cuba. First, the bill was one of a private character, promoting the interests of particular companies; second, it would create a railroad monopoly; third it would enable the consolidated railroads to control the development of Cuba; fourth, it would restrain liberty of commerce, and prevent the use of the most economical means of communication; fifth, it would be confiscatory of private property used for railroad warehouses and piers already constructed; sixth, it

would be detrimental to labor in that it would destroy many centers of labor; seventh, contrary to the statements of its proponents, the bill would not cause the upbuilding of an industrial Cuba; eighth, it would greatly injure the sugar interests, which represent ninety per cent of the source of the permanent wealth of the country; and ninth, the measure would be unconstitutional. As summed up in the brief presented by the attorneys for the sugar interests to the department of state at Washington, the bill confiscated the property of Americans only, and therefore, afforded a ground for a protest by the government of this country. It was further pointed out that the only lines eligible to the consolidation were those of which Colonel Tarafa himself was the largest stockholder.

In view of the protest of the interests affected, Secretary Hughes requested the Cuban government to delay the enactment of the bill, until the department of state could decide whether or not American property would be confiscated under the measure. This request was complied with; the senate delayed action upon the bill. Colonel Tarafa came to the United States and conferred with the secretary of state and with the representatives of the sugar and railroad interests. As the result of that conference, the bill was amended by the senate so as to be more nearly acceptable to the sugar interests, though absolute agreement was found to be impossible. It was understood at the time the conferences were held, that should an agreement be reached by the opposing interests, the state department would not have any further interest in the matter.

The bill in its amended form passed finally on September 25. The sugar interests again filed their protests with the secretary of state. No definite action was taken, however, to forestall the signature of President Zayas, and the bill became a law on October 9. In explanation of the law after his signature, the president stated that it made no provision whatever for confiscation of private property; but that on the other hand it gave to the Cuban executive the right to grant or withhold revocable permits to use private railroads and existing ports under certain conditions.

One phase of the agitation for the bill was the creation of the Veterans and Patriots Association, the president of which was General Carlos García Velez, minister to Great Britain. Agitation against the Tarafa bill was only one form of the association's opposition to the administration. In fact the platform of the association was remarkably like the program of reform which Ambassador Crowder attempted to get the Cuban government to inaugurate. Activities of the association became so displeasing that it was disbanded and the more prominent leaders placed under arrest.

Another incident which created friction between the United States and Cuba was the passage by the Cuban congress over the veto of President Zayas of a bill reorganizing the government lottery. Abolition of the lottery had been one of the major planks in Ambassador

Crowder's program of reform; as conducted, it is alleged that the lottery is the cause of much corruption in government. The recent law increases the number of collectorias from 961 to 2000 and provides for life tenure of these posts. Approximately half of the new positions are placed at the disposal of the president, while the other half are made subject to congressional patronage, the director of the reorganized lottery being the president's son. If the charge be true that the president has five hundred relatives in these posts at present, representing an income of $6,960,000 in a four year term the possibilities of the increased number of collectorias is immediately apparent. The passage of the bill was followed immediately by the return of Ambassador Crowder to Washington for a conference with the secretary of state, though as yet no tangible results of the conference are to be seen. The Tarafa measure and the lottery bill both gave rise to considerable criticism of the government on the ground of "foreign interference."

One outcome of the political disturbance resulting from the legislative action mentioned above was the establishment of an inspection of political messages transmitted by cable.

The Boston and Atlanta Federal Reserve Banks have been granted the right to establish agencies in Cuba.

On December 31, 1923, Cuba had a population of 3,123,040 according to the report of the directory of the national census.

Dr. Cosme de la Torriente has been selected as the first ambassador to the United States. Two days after his appointment on September 1, Dr. de la Torriente was elected president of the League of Nations assembly by the vote of twenty-four nations to nineteen.

The Obregon government of Mexico was recognized on August 31, and Dr. Antoni Martin Rivero was selected as minister on the following day.

The president has been empowered to appoint a commission of three members to propose a definite organization of the public service, determining the number of members in each office, their remuneration, and as far as possible their duties. The report of the commission is to be filed within one year of the date of appointment.

ECUADOR.—A company with a capital of 1,000,000 sucres, with main offices in Quito, has been organized to handle foreign trade and rural credit business. The company is to undertake the exportation of national products and the study of foreign markets, in addition to its efforts to improve the economic status of the interior regions.

GUATEMALA.—Expenditures for the fiscal year, July 1, 1923, to June 30, 1924, are estimated at 351,705,124.09 pesos national currency, distributed as follows: government and justice—73,767,380.00; treasury and public credit—52,390,933.08; promotion—59,306,986.28; war—66,440,557.88; public instruction—72,933,840.00; foreign relations—13,126,527.75; agriculture—13,378,900.00.

HAITI.—All civil employees of the government. who have been in the service at least twenty-five years and have attained the age of sixty, are entitled to a monthly pension of one-half of their salary, not to exceed one hundred gourdes. For the pension fund one per cent per month will be deducted from the employee's salary and also a twelfth of the first month's salary, or of an increase. The government will furnish the rest.

MEXICO.[1]—Minutes of the conference of representatives of the United States and Mexico were signed by J. Ralph Ringe, secretary for the American delegation and Juan F. Urquidi for the Mexican delegation on August 15. Details of the agreement arrived at were withheld until they could be presented before the senates of the two Republics. The general lines of settlement, however, appear to be as follows: sub-soil petroleum rights of Americans in lands acquired prior to the adoption of the Queretaro constitution of May 1, 1917, remain intact. The Mexican government indicated an unwillingness to guarantee such rights in lands acquired since that time by citizens of the United States. Delegates of the United States specifically reserved the point. Similarly agrarian rights acquired prior to the 1917 constitution, continue to be held subject to the provisions of the present constitution. Americans are to be protected against expropriation illegally made under color of law. Two claims commissions were provided for, the first to cover claims arising during the revolutionary period from 1910 to 1920 and the second to cover all other claims of Mexicans or of Americans. Recognition was extended on August 31, following the disposition of details by the respective governments. This was followed on September 3, by the appointment of Geo. T. Summerlin, as American chargé d' affaires, and Dan Manuel C. Tellez, as Mexican chargé d' affaires, to serve until the appointment of ambassadors by the respective countries.

Plans have been completed for the establishment of a new bank of emission, 51 per cent of the stock to be owned by the Mexican government and 49 per cent by foreigners, the management of the institution to be in the hands of private bankers. The new National Bank of Mexico, in addition to having the sole power of issuing currency, will be authorized to discount notes for other Mexican banks, and so relieve such banks from the danger of having too many frozen securities.

The thirtieth congress was open on September 1st, by a message from President Obregon. That the agitation resulting from the activities of the presidential candidates and their supporters has an echo in the national congress is shown by the shooting of one deputy by another on October 3, following charges made on the floor of the chamber of deputies.

[1]For earlier developments in the amity conference see this *Quarterly* for September, 1923.

It is understood that the Carnegie Institution of Washington is prepared to expend a maximum of $5,000,000 in the exploration of the old Maya ruins in Chichen-itza, Yucatan.

Judge John C. Knox of the Federal District Court in New York City dismissed a suit brought by the Oliver American Trading Company against the Mexican government for $1,600,000 on the grounds that a government recognized by the United States is not subject to suit in the courts of this country. An appeal is being prosecuted to the Supreme Court.

Mexico's application for membership in the International Chamber of Commerce was approved on October 10.

An agent of the League of Nations arrived in Mexico on August 22, to study Mexican conditions. On September 14 Mexico declined an invitation to join the League on the ground that Great Britain, which had not recognized Mexico, was represented on the Council.

The Obregon Government was accorded recognition by France on September 3.

The superior court of Massachusetts in a recent opinion has upheld the right of the Mexican government to bring suit in the courts fo the United States.

El Universal has started a good roads movement which bids fair to extend throughout the republic, popular interest being stirred by means of local highway committees. Expenses are to be deferred partly by the localities affected, partly by the state governments, and partly by the national government.

M. de Woelmont. the Belgian chargé d' affaires at Mexico City has been instructed to present his letters of credit to the Mexican government and notified that the chargés will be raised to the rank of ministers.

Amnesty has been given to exiled generals who may wish to return to their country to devote themselves to its work, provided they conduct themselves in an orderly manner.

President Obergon has removed Luis Marones, head of the Mexican Federation of Labor and high chief of communism in Mexico, from his position as first chief of military factories, warehouses, and supplies, which is said to be the most lucrative job in Mexico. Following the withdrawal of Marones communistic influence in the offices formerly under his control has been weakened.

During one week in June more than 1,335,000 acres of land were partitioned under the agrarian laws. It is estimated that the total for the month of June exceeded 3,000,000 acres. Distribution of a circular to state commissions by the national body has resulted in protests from the states on the ground that the national government was interfering in a matter of state administration. Meantime property owners in the state of Vera Cruz have organized an association to pool their interests in resisting the actions of the agrarian commissions. The organization in Vera Cruz follows the line of that in the state of Jalisco and Zacatecas.

On September 29 diplomatic relations between Mexico and Venezuela were suspended. According to the Mexican authorities the break came as the result of the continued refusal of Venezuela to recognize the diplomatic rights of representatives of Mexico in that country; although the immediate cause has been ascribed to the refusal of the authorities at La Guaira to permit a Mexican theatrical company to land there. The United States has assumed the attitude of a friendly observer, and every opportunity to be of assistance will be availed of.

The political situation in Mexico has become tense as the result of the campaigns of the various candidates for the presidency. Adolfo de la Huerta, reconsidering his earlier refusal to become a candidate, resigned his position as secretary of the treasury and on October 19 announced his candidacy. Soon afterward his successor to the treasury post, Señor Alberto J. Pani, issued a statement accusing de la Huerta of having misappropriated 10,000,000 pesos yearly, the money being expended largely for salaries of political posts at the disposal of the secretary. President Obregon apparently concurred in the accusations made by his secretary and the break between the "big three" in Mexican politics was evident. Señor de la Huerta immediately issued a denial of the allegations of Señor Pani and indicated that at the proper time he would make certain disclosures calculated to familarize the country with the action of certain officials in power, provided that his life was not cut short as was that of Fancisco Villa. The administration candidate for the presidency seems to be General Plutarco Elias Calles, who has the support of the radical elements. The murder of Francisco Villa complicated the situation as allegations were immediately made that the act was instigated by followers of Calles. A committee of the Mexican congress investigated the murder, and came to the conclusion that it was dictated by political motives though no names were mentioned by the committee at the time the report was made. The mystery surrounding the killing was clearly up on August 10 by the confession of Jesus Salas, a member of the state legislature of Durango, that he had plotted the assassination. The state legislature immediately suspended his parliamentary immunities and steps were taken to bring him to trial. No connection between the murder of Villa and the candidacy of either of the leading figures had been established at the time of going to press. The country seems to be fafrly evenly divided between the two leading candidates, and it is feared that the consequences may not be salutary. It is rumored that when the election returns are finally in, neither of the leading candidates will be elected, but rather that Francisco de la Barra, who acted as chief executive from the downfall of Diaz to the inauguration of Madero will be found in the presidential chair.

Plans are under way to amend article 83 of the Mexican constitution for the purpose of extending the term of the president from four

to six years. The plan is meeting with approval in many quarters because of the feeling that the agitation connected with the presidential campaign plus the inexperience of a new president leaves little time for efficient administration in the course of four years.

Following the charges by Secretary of Treasury Pani revealing a deficit in the treasure, and in view of the possible necessity of suspending payment on the foreign debt, the president has issued a decree reducing the salaries of all federal employees, civil and military, ten per cent.

Following the completion of the work of the Mexican-American amity conference, two conventions have been entered into between the United States and Mexico. The general claims convention covers all claims arising since July 4, 1868, except those falling within the special convention which covers all claims arising between November 20, 1910, and May 31, 1920, inclusive. Each commission will be composed of three members, one to be appointed by the President of the United States, one by the President of Mexico, and the third by mutual agreement between the two countries or, in case of failure to agree, by the president of the permanent administrative council of the Permanent Court of Arbitration at the Hague. The special claims commission is to meet in Mexico City, and the general claims commission in Washington. All claims to be considered by the general claims commission must be filed within one year from the day of its first meeting. The commission is given three years in which to hand down its decision. Two years from the date of the first meeting of the special commission are allowed for the filing of claims, the decision to be handed down by the commission within five years from the date of the first meeting. All claims are to be decided by a majority vote.

Mexico City has been selected as the meeting place for the convention of the Pan-American Federation of Labor to be held in December, 1924.

During November a conference of health officials of Mexico and Texas will be held in Mexico City to work out plans for more adequate coöperation in the enforcement of health regulations.

NICARAGUA.—The conventions adopted by the Central American conference at Washington in 1922 have been ratified by Nicaragua and were promulgated on March 15 and 16 of this year.

The government has under consideration the construction of a railroad from Lake Nicaragua to the Atlantic coast. Should this road be constructed it will afford a rail and water route between the Atlantic and Pacific oceans.

PARAGUAY.—A general amnesty extended to all persons exiled during the recent revolution has been proclaimed by the government.

Dr. Eligio Ayala was elected provisional president of the Republic

by congress on April 10, to succeed Dr. Eusebio Ayala, who had recently resigned.

A bureau for agricultural defense is to be established for the purpose of protecting Paraguayan products against possible invasion of foreign diseases.

SALVADOR.—An agreement has been signed between the government of Salvador and representatives of certain banking interests in the United States relative to the floating of a $6,000,000.00 loan in this country. Under the agreement, the department of state has undertaken to faciliate the arbitration of any disputes that might arise in connection with the loan. The secretary of state is to use his good offices in referring such disputes to the chief justice of the supreme court of the United States, or if he is unable to act, to another member of the same court for appropriate arbitration. The secretary has also agreed to assist in the selection of the collector of customs who, according to the loan contract, may be appointed in case of default. This collector of customs, if appointed, is to communicate to the department of state for its records, regulations regarding the customs administration, and also monthly and annual reports.

SANTO DOMINGO.—A technical commission composed of Dr. Moises Garcia Mella, Gustavo A. Diaz, and Dr. Ricardo Pérez Alfonseco has been named to study the boundary question between Santo Domingo and Haiti.

VENEZUELA.—General Juan C. Gomez, first vice-president of Venezuela and Governor of the Federal District, was stabbed to death on June 30. General Gomez was the brother of President Gomez.

The total national debt on December 31, 1921, amounted to 114,803,091.67 bolivars.

Ratifications of the treaty of extradition between Venezuela and the United States signed on January 9, 1923, were exchanged on April 14.

NEWS AND NOTES

EDITED BY FRANK M. STEWART

University of Texas

NOTES FROM ARKANSAS

PREPARED BY THEODORE G. GRONERT AND DAVID Y. THOMAS

University of Arkansas

SPECIAL SESSION OF THE LEGISLATURE.—On September 7 Governor McRae issued a call for an extra session of the legislature to consider the reorganization of the state highway department and the construction and maintenance of an adequate system of state highways. The special session was necessary, the governor pointed out, because of the failure of the last regular session of the legislature to provide for any road program; and because such failure had resulted in the temporary withdrawal of federal aid.

The governor suggested that in order to meet the requirements of the federal authorities, the state highway department should be reorganized, so as to place the power of appointment and removal of employees in the hands of a commission. All funds were to be paid out only by order of the commission and the good faith of the state was to be pledged to maintain all roads to which federal aid was allotted.

A bill drawn up with the advice of experts was offered by the governor as a suggestive measure. This bill met with considerable opposition because it was held the method of financing provided for would be unfair to many road districts. Also, there was a strong demand for the retention of the proposed tax in the counties where collected. The opposition to the governor's bill was strong enough to cause its defeat in the assembly, but the proponents of good roads succeeded in mustering sufficient support in each house to pass the Harrelson Bill, which follows the general lines laid down in the governor's bill, but divides the tax with the counties. This bill was signed by the governor and is generally considered a satisfactory substitute for the original bill, although it has not at this writing received the formal approval of the federal authorities.

The bill provides for the gradual paying off of the bonded indebtedness of the road districts, the establishing of road-building on a state-wide scale, and the proper financing and supervising of such construction, and its upkeep.

A tax on oil and gasoline, and the money realized from the auto license tax will be used by the state to raise the state's share of the fund. The rates on oil and gas have been raised, so that oil and gas will be taxed ten cents and four cents a gallon, respectively. The tax being only one cent on gasoline in Texas, the filling stations on the Arkansas side of Texarkana, where the tax was three cents, had

already been driven out of business. To present such evasions of the tax, the bill contains an article of doubtful constitutionality requiring the payment of the tax on gas bought in adjacent states. The penalty for violation of this section is a fine not exceeding $100. The license fee on all auto vehicles has also experienced a decided revision upward, the charge being based on the horsepower of the engine and the weight of the car. Out of the fund thus collected $3,000,000 is to be divided among the counties on the basis of population.

An interesting episode of the special session occurred when the anti-highway forces, realizing that the passage of the Harrelson Bill was inevitable, bolted the meeting. C. S. Barrett of Georgia, president of the National Farmers' Union, was an active lobbyist against the Harrelson Bill.

CONSTITUTIONAL AMENDMENTS SUBMITTED.—At the winter session the legislature submitted three amendments, all the constitution allows at one time, to be voted on in 1924. The first allows the legislature to increase the number of supreme court judges to seven and to provide for the court sitting in two divisions. In all cases where the construction of the constitution is involved, they must sit *en banc*. In case any judge sitting in a division dissents from the decision, the case shall, upon the request of the chief justice, or of the dissenting judge, be transferred to the court *en banc*. The amendment, if adopted, will increase the salaries from $4,000 to $7,500. Substantially the same amendment has already been submitted twice, but failed of adoption because it did not receive a majority of the total vote cast.

The second amendment requires that the fiscal affairs of cities and counties be "conducted on a sound financial basis," and forbids fiscal agents to make any contracts or issue warrants in excess of the revenue. Any officer found guilty of violating this provision shall be subject to a fine of not less than $500 nor more than $10,000 and shall be removed from office. In order to secure funds to pay debts outstanding at the time of the adoption of this amendment, cities and counties may issue bonds and for their redemption may levy a tax in addition to that now allowed (five mills) of not over three mills until such indebtedness is paid.

On the overthrow of the carpet-bag government (1874), cities and counties were allowed to issue bonds to take up outstanding debts, but were forbidden to issue any more. However, they were not forbidden to exceed the revenue, and many now have large floating debts in consequence of which the "scrip" is at a discount. The amendment is designed to cure that evil, but it will not allow cities to issue funds for improvements. For that they will have to depend on the improvement district system. A proposition to allow cities to issue bonds has failed of adoption twice.

The third amendment forbids the passage of any local bill whatever

by the legislature and allows the municipalities and counties to take care of this by the initiative and referendum. This is to be regulated by a general law passed by the legislature subject to the following safeguards: the number of signatures necessary to initiate a local bill is fifteen per cent of the vote cast at the previous election for mayor in cities and circuit clerk in counties. The time allowed for filing an initiative petition shall not be less than sixty nor more than ninety days; for a referendum petition, not less than thirty nor more than ninety days after the passage of the measure by a municipal council.

In 1920, a new initiative and referendum proposed through the initiative, including the above provision for counties and municipalities, received a majority of the votes cast on the measure, but not a majority of the total vote, and was declared not adopted. In 1922 the same measure was overwhelminly defeated. One objection seriously brought against this measure in 1922 was the provision giving the initiative and referendum to counties and municipalities.

At the winter session the legislature also passed a law that no student shall be granted a diploma by any high school unless said student has had a course in American history and government covering a year. No university, college, or normal school chartered by the state may grant any degree to any candidate who has not met these requirements either in high school or college. The rule does not apply to those who registered previous to September, 1922.

JUDICIAL DECISION.—On October 15, the notable case of *The Coronado Coal Company vs. The United Mine Workers of America*, came before the United States District Court for retrial. A district court award to the plaintiff of $600,000 damages had been reversed by the supreme court, when it ruled that the evidence did not show sufficient interference with interstate commerce to amount to a violation of the Interstate Commerce Act. On retrial new evidence was introduced in the attempt to prove the guilt of the union. On Ocober 27, Judge Pollock instructed the jury to bring in a verdict of not guilty, on the ground that the evidence had failed to establish a direct purpose to interfere with interstate commerce. The lawyer for the plaintiff gave notice of appeal.

NOTES FROM TEXAS

PREPARED BY THE EDITOR OF NEWS AND NOTES

GOVERNOR ATTENDS GOVERNORS' CONFERENCES.—Governor Pat M. Neff represented Texas at two important conferences during October—the annual conference of governors held at West Baden, Indiana, October 18-19, and a special meeting of the state executives at Washington, October 20, called by President Coolidge

to discuss prohibition enforcement. During the absence of the Governor, Lieutenant-Governor T. W. Davidson discharged the executive duties.

EDUCATION SURVEY DIRECTOR CHOSEN.—Dr. G. A. Works, professor of rural education, New York State School of Agriculture in Cornell University, has been chosen by the Educational Survey Commission to direct the Texas Educational Survey.

At the regular session of the Thirty-eighth Legislature an educational survey was authorized, and an appropriation of $50,000 made for its expenses. Provision was made for the selection of an Educational Survey Commission of twelve members. The director will select his staff, with the approval of the Survey Commission. The survey must be completed by December 1, 1924.

To further the efforts of the Survey Commission and to stimulate public interest and support in its work, a Federated Educational Council of Texas was created at a meeting of several hundred interested citizens held in Dallas in October. The purpose of the organization is to bring to the attention of the people the tremendous importance of the Survey Commission's work and the benefits that may be expected from a scientific survey of the Texas educational system.

MONTHLY FINANCIAL STATEMENT OF STATE ISSUED.—In pursuance of a law passed by the last legislature the Comptroller of Public Accounts has issued the first monthly financial statement of the State. The statement purports to show the condition of the State's finances on October 10, 1923. Future reports will be issued monthly. The passage of the act grew out of the desire of the legislature to have available monthly, particularly during legislative sessions, a balance sheet of the State's financial condition.

PERSONAL NOTES

Mr. Clyde Eagleton, associate professor of history at Southern Methodist University, is on leave of absence for the session of 1923-1924. He is an instructor in history at New York University and is doing work at Columbia University toward his doctor's degree.

Mr. Joe L. Clark, head of the department of history and social sciences at Sam Houston State Teachers' College, is on leave of absence doing graduate work at the University of Texas. His position is being filled this year by Mr. M. F. Kennedy.

Mr. W. A. Jackson, assistant professor of political science at Baylor University, has returned from a year's leave of absence spent in graduate work at the State University of Iowa.

Dr. Herman G. James, professor of Government, University of Texas, and Editor of the *Quarterly*, returned in August from Brazil where he had been engaged in research work since June, 1922. His

book, "The Constitutional System of Brazil," will soon be published by the Carnegie Institution of Washington.

New appointments in the social science departments of the University of Texas are: Tom P. Martin, associate professor of history; E. E. Hale, adjunct professor of economics; and Ruth A. Allen, James R. Beverley, and R. A. Cox, instructors in economics.

Mr. W. P. Webb, adjunct professor of history at the University of Texas, has returned from a year's leave spent in the graduate department of the University of Chicago.

Mr. Robert P. Felgar of John Tarleton Agricultural College has accepted a position as assistant professor of history and social science at the College of Industrial Arts.

With the beginning of the academic year 1923-1924 several promotions in the social science departments of the University of Texas were announced: T. W. Riker to be professor of history; C. W. Hackett, F. B. Marsh, M. R. Gutsch, to be associate professors of history; C. P. Patterson, to be associate professor of government; and M. W. Graham and F. M. Stewart to be adjunct professors of government.

Dr. W. M. W. Splawn, professor of economics at the University of Texas, who was appointed on the Texas Railroad Commission last spring, has been endorsed by the Republican National Committeeman from Texas, and many other individuals and organizations in the Southwest, for appointment to the next vacancy on the Interstate Commerce Commission.

Professor S. J. Brandenburg of the department of economics and sociology of the University of Arkansas has resigned to accept a position at Clark University.

Proceedings of the Texas Bar Association held at Beaumont July 3-5 were published in the fall issue of *The Texas Law Review*.

Professor Charles F. Coan of the University of New Mexico is writing a history of New Mexico for the American Historical Society.

Several papers read before the fourth annual meeting of the Association at Southern Methodist University last spring have been published in other magazines or books. The paper of Dr. Malbone W. Graham of the Department of Government of the University of Texas, "Humanitarian Intervention in International Law as Related to the Practice of the United States" will be published in the *Michigan Law Review* for January, 1924; Professor D. Y. Thomas of the department of history and political science of the University of Arkansas, published his paper, "The International Court of Justice" as the last chapter of his book, "One Hundred Years of the Monroe Doctrine," recently published by the Macmillan Company. "The True Mr. Froude," a paper prepared by Professor Curtis Walker of Rice Institute, was published in *The Texas Review* for July.

Dr. John C. Granberry, professor of economics, sociology and po-

litical science at Southwestern University, spent the summer in Europe studying conditions for the World League against Alcoholism.

October 24th was League of Texas Municipalities Day at the State Fair at Dallas. On November 13th the annual Mayors' Day of the Fort Worth Kiwanis Club was celebrated. The twelfth annual convention of the League will be held in Paris during the second week of May, 1924. Celebrating its tenth birthday on November 4th, the current issue of *Texas Municipalities* contained a sketch of the organization meeting, and a brief review of the principal activities of the League since 1913.

Resignations of two professors in the social science departments of the University of Texas occurred during the summer: Professor C. S. Boucher of the department of history, going to the University of Cricago; and Professor A. B. Wolfe of the department of economics and sociology, going to Ohio State University.

Dr. G. W. Cunningham, professor of philosophy at the University of Texas, has been selected as University Research Lecturer for 1923-1924. Professor Cunningham has been excused from most of his teaching duties and will devote his time to research, the results of which will be embodied in several public lectures to be delivered next spring.

Meetings of a number of State-wide social and civic organizations were held during October and November. The list includes: Texas League of Women Voters, San Antonio, October 23-25; Texas Conference of Social Welfare, November 4-7, Wichita Falls; Texas Library Association, November 26-28, San Antonio; Texas State Teachers' Association, November 29 to December 1, Fort Worth.

The Department of Government of the University of Texas was represented at the National Conference on the Science of Politics held at Madison, Wisconsin, September 3-8, by Mr. B. F. Wright, Jr. Mr. Wright was secretary of the round table on public law. The report of this section will be published as a supplement to *The American Political Science Review.*

Professor F. F. Blachly of the department of government of the University of Oklahoma, and Secretary of the Oklahoma Municipal League, presented a paper, "Services of a League of Municipalities, and the Work of the Oklahoma League," before the Fifteenth Annual Convention of the League of Kansas Municipalities, Hutchinson, October 16-18. Dr. Blachly attended the National Conference on the Science of Politics held at Madison, Wisconsin, September 3-8.

The League of Texas Municipalities has been invited to join the Texas Council of State Wide Social Agencies. The Council has been in existence for three years, and is composed of representatives of various state social and civic agencies. Meetings are held five times a year for a discussion of common problems.

President Cockrell has appointed as a committee on program for the Fifth Annual Meeting, the following members: Frank M.

Stewart, Chairman, University of Texas; Professor D. Y. Thomas, University of Arkansas; F. F. Blachly, University of Oklahoma; C. F. Coan, University of New Mexico; Walter Prichard, Louisiana State University; C. W. Ramsdell, E. T. Miller, University of Texas; Associate Professor C. P. Patterson, University of Texas; Adjunct Professors, W. E. Gettys, M. W. Graham, University of Texas; and Instructor B. F. Wright, Jr., University of Texas.

At the Fourth Annual meeting a committee on financial support from the institutions of the Southwest was authorized. The purpose of the committee is to raise funds for the support of the Association from the institutions of the Southwest. It has been suggested that each institution contribute an amount equal to twenty-five cents per student enrolled in the social science departments.

The Committee is composed of the following professors: George B. Jackson, Wesley College; Joe L. Clark, Sam Houston State Teachers College; Gus L. Ford, Weatherford College; F. F. Blachly, University of Oklahoma; L. F. Sheffy, West Texas State Teachers' College; Wm. Stuart, Texas Woman's College, J. P. Comer, Southern Methodist University; W. J. McConnell, North Texas State Teachers' College; W. E. Garnett, Agricultural and Mechanical College of Texas; D. F. McCollum, East Texas State Teachers' College; H. G. Allen, College of Industrial Arts; J. C. Granberry, Southwestern University; S. L. Hornbeak, Trinity University; R. E. Sheppard, Texas Christian University; C. F. Coan, University of New Mexico; G. P. Wyckoff, Tulane University of Lousiana; Walter Prichard, Louisiana State University; and W. A. Jackson, Baylor University.

Two members of the sociology department of the University of Texas were honored by the recent convention of the Texas Conference of Social Welfare at Wichita Falls; professor M. S. Handman was elected president, and Mr. W. E. Gettys, secretary-treasurer for 1923-1924.

Dr. Charles W. Hackett, associate professor of Latin-American history at the University of Texas, has been appointed as a member of a Board of Associates for *Current History Magazine*. The board consists of twelve American University historians and the purpose will be to cover the history of the world month by month by regions. Professor Hackett's section consists of Mexico and Central America. His first contribution appears in the November issue under the title, "Mexico and Central America."

SPECIAL NOTICE.—*The Association needs one hundred new members.* A special campaign is under way to add these before the next annual meeting. If that is accomplished, a small volume of convention proceedings can be published for the first time. Members can help in this campaign. Literature on the work of the Association is available at the office of the Secretary, and members are urged to write for a supply of the literature or send the Secretary a list of

names of persons whom you think should be interested in the Association.

The Executive Committee has announced that the Fifth Annual meeting of the Association will be held at the University Club, Fort Worth, March 24-26, 1924. The acceptance of the invitation of the Fort Worth University Club marks a departure from the previous custom of holding the meetings at academic institutions.

BOOK REVIEWS

EDITED BY B. F. WRIGHT, JR.

University of Texas

THE NEW CONSTELLATIONS OF EUROPE

BRYANT, LOUISE. *Mirrors of Moscow.* (New York: Thomas Seltzer, 1923. Pp. xv, 209.)

BAGGER, EUGENE S. *Eminent Europeans.* (New York: G. P. Putnam's Sons, 1922. Pp. xix, 203.)

TELEKI, COUNT PAUL. *The Evolution of Hungary and Its Place in European History.* (New York: The Macmillan Company, 1923. Pp. xxiii, 312.)

TORMAY, COUNTESS CECILE. *An Outlaw's Diary: Revolution.* (New York: Robert M. McBride and Company, 1923. Pp. xiv, 291.)

BOUTON, S. MILES. *And the Kaiser Abdicates: The German Revolution, 1918-1919.* (New Haven: Yale University Press, 1921. Pp. 332.)

DEVEREUX, ROY. *Poland Reborn.* (New York: E. P. Dutton and Company, 1922. Pp. 256.)

To those who live in this distant isolated planet we call America, far off from the orbit of the dying solar system that was Europe—a Europe with ancient and well-charted luminary powers, each with its satellite client states surrounding it, the cataclysm that disrupted that established system in A.D. 1914-1918 has produced an anomalous situation. It is as though from some great distance we were looking upon that planetary zone now filled with asteroids, mere wreckage of a former splendent glory, and scarcely discernible without telescope or spectro-photograph. To one accustomed to their less dazzling atmosphere, however, the asteroids of today, despite their lesser brilliancy than the ancient and irretrievably shattered system, would appear, with their siderial background, eminently worthy subjects of study and sufficiently interesting to merit scientific scrutiny or the spectrum analysis of their components.

Such are the monographs under our gaze. The Bryant Reflector, Louise Bryant's *Mirrors of Moscow*, has produced an enlarged, though not necessarily distorted picture of what we might term the Muscovite constellation, with special photographs from Lenin down to the variable Tchicherin and the multiple lesser luminaries and Soviet satellites, including that evanescent comet, Enver Pasha. Miss Bryant's work is sketchy and artistic. It does not aim at propaganda, as such, but rather to acquaint the isolated Americans with the leading personalities of Sovietdom, and the journalist's impressions are well recorded. There is no attempt at thorough analysis of character and influence, but rather at impressionistic imagery, which raises the proletarian leaders of Russia above the sordid level of a world in economic collapse. To vivify the living leaders of a country almost

politically extinct—such is the scope and purpose of Miss Bryant, and thanks to her, Lunacharsky, Kollontai, Dzerzhinsky and Karakhan become more than mere unintelligible names in press despatches. For such photography readers will be grateful.

Bagger, in his *Eminent Europeans*, on the other hand, has not been content with one red corner of the heavens. His is a keen analysis of individual stars among the more outstanding luminaries, and he selects eclectically the objects of his study, the real factors in the political aftermath of war and revolution. With an incisive pen he portrays, though not with equal effectiveness, the leaders of the new states of Central and Eastern Europe. His pen picture of Paderewski is excellent, while the sketches of Rumanian royalty approach the commonplace. It is when he writes of Masaryk and Benes, of Karolyi and Horthy, however, that he is at his best, and the biting irony, the subtle sarcasm of the latter sketch makes it outstanding. But Bagger, in contradistinction to Miss Bryant, seeks not merely to portray but to interpret—in some cases with considerable feeling. One will not, in all likelihood, agree with all the author's interpretations, but he can hardly fail to admire.

Turning to the other treatises under discussion, they are of no less value because of their different astronomical approach. To Count Teleki, the eminent cartographer of the Magyar Constellation, it has been given to compile the most scientific, statistically verified presentation, alike of the economic and the political evolution of Hungary. To portray the fabled millenary Hungary with accuracy, to analyze every factor in her development, including the struggle of various races for possession of the Danube basin, to continue in miniature the unfinished task of Andrassy in his study of *The Development of Hungarian Constitutional Liberty*, to write for the Institute of Politics a Hungarian version of *The Economic Consequences of the Peace*—such was the opportunity and problem of Teleki, and, in the main, he has handled it well. An ardent chauvinist and nationalist, his racial pride prevents him from seeing clearly the contemporary issues, *quorum pars fuit*. It is there that one must take exception to an otherwise scientific and monumental work. It is when the data of Bagger and of Cecile Tormay—both intimate observers of Hungary although from opposite political poles—are compared with that of Teleki that one finds occasion to question his accuracy, due, no doubt (to return to our astronomical analogy) to the fact that the magnetic disturbances emanating from Paris and Moscow, respectively, caused a distortion of the red lines in his spectrum analysis.

The first volume of *An Outlaw's Diary*—a monograph on the first Habsburg occultation—on the other hand, does not feature as vividly as will the second (still forthcoming), the red lines in the spectrum of Hungary. It is only her sensitive measurement of the gradual appearance of pink lines in the period before the eclipse of Karolyi that gives a distinctive touch to Miss Tormay's analysis. But, ably

written as is her work, one must warn the reader against her passionate and blind defence of an obsolete social order. A countess, and thus, like Teleki, a defender of Magyar upper class domination, Miss Tormay can only pour fourth venomous abuse upon the one man who dared break with his caste and defend the liberties of the populace against the inherited tradition of *boiar* rule. Happily Bagger forms a complete antidote. To Miss Tormay, Karolyi is "a traitor," "a stunted degenerate," "the deformed offspring of a consanguineous marriage," a "guilty megalomaniac," a "ridiculous parvenu." "Michael Karolyi started his career with lies, continued it with dishonor and now has landed in the mire." In brief, Karolyi is the epitome of everything that is vile and to be abhorred. To Bagger, "his fate is tragic . . . but defeated he is not, for his faith is stronger than ever" after the catastrophe that overtook him. "We know today that . . . it was Karolyi who had been deceived all the while, together with liberals in all lands." "He was not a traitor—if anything he was betrayed . . . Karolyi was the victim, not the villiain." "Some of his friends wishing to damn him with faint praise called him the Pure Fool of Hungary. If he be that—the accent is on the pure." Thus throughout Miss Tormay's book the spectrum is reversed, and the lines which Bagger observes as of whitest brilliancy are deep bands of black between the yellow of Karl IV and the vivid red of Bela Kun.

If the three foregoing observers have confined their attention to the Habsburg occultations and the lurid intervals between, Bouton, on the other hand, has made an excellent study of the constellation *Germania*. As its title indicates, *And the Kaiser Abdicates* discusses the Hohenzollern debacle as a permanent occultation behind the new orb of constitutional socialism. It represents a careful study made from personal observation as well as from a synthesis of other observers' reports. Here too one notes the alternating frequency of red and white lines in the German political spectrum, their expansion and contraction, distribution and dispersion, as military and diplomatic defeat, revolution and famine at home, were followed by civil war and its repression. But the descriptive phases of the book are as valuable as the analytic, and the role of Liebknecht as the lurid red luminary of Spartacism, and of Wolff as the brilliant organizer of the German Democratic Party are well pictured.

In contrast to the monarchial occultations, Mrs. Roy Devereux writes of that dark star but recently rekindled into luminance—*Poland Reborn*. After a succinct summary of its virtual obliteration in the three familiar stages of 1772, 1793 and 1795, and of the recurrence of luminosity in 1831, 1846 and 1863, the author depicts the renascence of Poland and does much to clear up the misapprehensions of Britishers, and incidentally, of Americans, in regard to the political capacity of the Polish people. The book is frankly pro-Polish, at the expense of Russia, Germany and the Ukraine. The impressions gathered by the author from Polish generals and soldiers, as well as

from statesmen like Dmowski and Skirmunt, tend to give an inevitable bias to the treatment of the nation which she regards, in accordance with the famous Napoleonic dictum, as "the key-stone in the arch of Europe"—the cynosure of the new Heaven and the new Earth. For its felicitous presentation of Polish art and culture, for its revelation of the indefatigability of the Poles—despite the weaknesses of their leaders—at political and social reconstruction, the book may be praised, but one should take *cum grano salis* the pleas for Poland as an equipoise to Germany and Russia in the new military Balance of Power in Europe. In view of the singular ineptitude of Polish statesmanship at playing such a stellar role, American observers may well be wary of any attempt of the *Nova Polonia* to outshine the other luminaries in the European system.

Such are the new constellations of Europe. Their external aspects, as noted, differ materially from those of the old system destroyed by the late cataclysm. Their components, revealed by their spectra, contain the familiar bright lines of constitutional government, as well as the red bands of social revolution and the yellow streaks of dynastic decadence. And more—they give evidence of the existence of new elements which no political scientists can afford to ignore.

MALBONE W. GRAHAM.

University of Texas.

MITCHELL, WESLEY C.; KING, W. I.; MACAULAY, F. R.; AND KNAUTH, O. W. *Income in the United Sttes.* (Volumes I and II, New York: Harcourt, Brace and Company. Pp. 152, 440.)

KNAUTH, OSWALD W. *Distribution of Income by States in 1919.* (New York: Harcourt, Brace and Company.)

The problem of scientific method in the fields of government, economics and sociology presents itself more insistently year by year. In the two latter fields, at least, no method yet devised has proved more useful than the statistical; by means of which vast accumulations of facts may be expressed briefly, and arranged so that their relationships and their true significance become apparent.

The National Bureau of Economic Research, which was organized in 1920, "to conduct quantitative investigations into subjects that affect public welfare," has published three extremely valuable books, in which, by means of the statistical method, most important results have been obtained. The first of these books is a summary of the findings made by the brilliant staff of the Bureau, headed by Dr. Wesley C. Mitchell, during a year's study of the amount and distribution of income in the United States. The second volume is a detailed report upon the same material; and the third is a study by Dr. Oswald W. Knauth of the distribution of income among the various states in the year 1919. All the volumes display the greatest care, accuracy and lack of bias in their handling of data. They realize fully the Bureau's hope "to aid all thoughtful men, however

divergent their views of public policy, to base their discussions on objective knowledge as distinguished from subjective opinion."

The study of income in the United States covers the ten year period from 1909 to 1918, with some added data for the year 1919. Two independent investigations were made, under the direction of different persons; one estimate being based on sources of production, and the other on incomes received. The data for each estimate are presented, the range of probable error is frankly stated, and difficulties and inevitable inaccuracies are set forth with great candor. Discussion of many theoretical points, such as the reasons for the decision, "that taxes which are added to selling prices should, and that taxes which are not added should not, be deducted from the value products of the industries taxed," the method of "deflating" estimates to "hypothetical dollars of constant purchasing power," and so on, increases the reader's confidence in the reliability of the conclusions, which the staff of the Bureau believe to be accurate within ten per cent.

What picture of our national income and its distribution is drawn in these volumes? This income has developed from 28.8 billions of dollars in 1909, to 61 billions in 1918; while if services for which as a rule no money is paid, notably the services of housewives, were expressed in terms of dollars and added to these totals, they would be considerably increased. The per capita income in 1909 was $319 and in 1918 it was $586; but if prices in the year 1913 be taken as a basis, the purchasing power of the per capita income was $333 in 1909 and $372 in 1918. At the outbreak of the war in 1914 the per capita income of the United States was $335, as against $263 in Australia, $243 in the United Kingdom, $185 in France, and $146 in Germany; while our total national income at this time was more than 33 billions of dollars, as against less than 11 billions in any other country. There is no doubt that the United States is the richest country in the world.

How is this wealth distributed? In the "highly organized industries conducted on a large scale," wages and salaries absorb about 69-72 per cent of the "net value product"; while interest, rent and profits receive the remaining 31-28 per cent. Of the total payments to employees in these industries, about 8 per cent goes to officials and the remainder to manual and clerical employees. Of the total number of persons employed in 1918, about 86 per cent had incomes of less than $2,000. Of all persons receiving incomes, 95 per cent have incomes of less than $3,300 a year, while those receiving $5,000 and above are but 2.25 per cent of our total population. The most prosperous 5 per cent of our income receivers, receive nearly 26 per cent of the total national income. These are facts of the very greatest social significance; and no student of government, economics or sociology can afford to be ignorant of them or to disregard them. At the present time, when fine words can no longer conceal the fact

that the outstanding political questions arise from economic maladjustments, such a study as this demands the most thoughtful attention.

Mr. Knauth's analysis of the distribution of the national income by states in 1919 (the only year for which certain types of data are available) gives valuable additional information. Thus, in 1919 the average income per person gainfully employed (not including farmers) was $1,592 throughout the United States, $2,014 in New York, $1,046 in Arkansas, $1,132 in Louisiana, $1,205 in New Mexico, $1,591 in Oklahoma, and $1,461 in Texas. The average income of farmers throughout the United States in the same year was $1,682; it was $1,162 in Arkansas, $1,069 in Louisiana, $1,205 in New Mexico, $2,227 in Oklahoma, and $2,030 in Texas. If a study of this type could be carried out over a series of years, the extent of fluctuation of agricultural incomes as compared with the fluctuation of other incomes could be measured; and those who desire to make the farmer more secure economically would be materially aided in basing their efforts on definite information rather than the feeling that "something must be done."

These books deserve wide reading and careful study. The fact basis which they offer is invaluable to all who are interested in the group of problems attacked by them, only a few of which have been indicated in this review; and their attitude of absolutely impartial inquiry, their simple summary of results, are an admirable example of truly scientific method.

MIRIAM E. OATMAN.

Norman, Oklahoma.

PATTERSON, CALEB PERRY. *The Negro in Tennessee, 1790-1865.* (Austin: The University of Texas, 1922. Pp. 213.)

Discussions of the institution of negro slavery in America aroused such violent feeling both during its existence and afterward that even now a cool and detached examination of the evidence concerning it is attended with serious difficulties. Yet an understanding of its character and working is essential to a correct apprecition of more than two centuries of southern life and politics. By far the most scholarly, scientific and comprehensive treatment of this intriguing subject is Professor U. B. Phillip's volume, *American Negro Slavery*, published in 1918; but even that fine piece of work has by no means exhausted the materials worthy of study. There is still room for valuable monographs of a local nature. Professor Patterson has attempted to perform this task for Tennessee.

With one end in the Mississippi bottoms and the other tilted up in the mountains, Tennessee belonged to both the cotton-growing lower South and the grain-and-stock-growing border states. Divided into three sharply defined sections of fairly equal strength, it experienced during the forty years before secession many a sharp con-

flict between rival economic, social, and political interests. In many of these the institution of slavery was directly or indirectly concerned.

In general, the scope of Professor Patterson's book may be indicated by his chapter headings. The first is a brief summary of the status of the negro in North Carolina before 1790 and in the territory which became Tennessee in 1796. The others deal with the legal status of the slave in Tennessee, 1796-1865; the economics of slavery in Tennessee; anti-slavery societies; religious and social aspects of slavery; the legal status of the free negro; and a final one entitled "Abolition" which is concerned primarily with legal methods of manumission, the early anti-slavery movement, and the legislative reaction to the northern abolitionist agitation. Despite the dates in the title, there is no discussion of conditions during the Civil War.

The author's interest seems to have been chiefly in the legal status of the negro, slave or free. The development of the legal code is very well traced, but not enough evidence is produced of its actual operation. It is well known that the tendency everywhere was for the letter of the law to be much more severe than its application to the slave. The material in the chapter on the economics of slavery is too limited to be very convincing. The fact that selected planters in Middle and West Tennessee were prosperous at stated times does not prove that all their neighbors or that they themselves were habitually successful. We know that in equally good cotton lands further south planters were frequently face to face with ruin because of crop failures or low prices. We know also that grain and stock-growing with high-priced negro labor was generally unprofitable elsewhere, and we should like to know more about how the Tennessee farmer managed it. It is not clear why the chapters on anti-slavery societies and abolition are so widely separated. The change in attitude of the churches, especially the more populous, is well exhibited. Here, as elsewhere, the democratic pioneer churchmen, having no slaves, abhorred the institution, while their children, after acquiring wealth, embraced it with pious ardor. Nowhere does the author more than hint at the political and sectional conflicts which attended the development of the slave code or the early emancipation movement, except that he indicates that the early anti-slavery men were chiefly in East Tennessee.

There are but few statements of fact that can be questioned. It seems doubtful that the changes in the status of the slave in judicial procedure—that is, in denying him the right to testify in cases involving white persons—were due to racial prejudice (pp. 24, 32). There were too many other factors inherent in his condition which must have counted even more heavily than this one. In the statement, a common assertion by the way, that slavery produced aristocracy and social classification (p. 63), the author seems to overlook the fact that capitalism everywhere does that. The slave plan-

tation was essentially a capitalistic enterprise and slave-holding was as much a result as a cause of the accumulation of wealth.

There is a useful bibliography at the end of the work and a few pages of appendices, more or less statistical. There is no index, which to this reviewer is always unpardonable if the book is intended for reference. This lack is partly made good by a full table of contents. The book will be useful as a brief compendium of facts concerning an interesting institution in an important region.

CHAS. W. RAMSDELL.

University of Texas.

MUNRO, WM. BENNETT. *Municipal Government and Administration.* (New York: The Macmillan Company, 1923. 2 Volumes, Pp. xii, 459, 517.)

Every teacher of municipal government will welcome the appearance of this work by Professor Munro. It is an enormous help as a text for the teaching of a comprehensive course in municipal government and administration. Strictly speaking it is not wholly a new work, but in good part a revision of the earlier two volumes by the same author, the *Government of American Cities* and *Principles and Methods of Municipal Administration.* But while a large part of the new work contains the same material, brought up to date, as is found in the other two volumes mentioned, there are some additions which increase the value of the work very considerably. There is, for instance, a generally long division in Volume I on the evolution of the city which gives a brief but helpful survey of city development in general with special reference to the United States.

In Volume II, dealing with administration, the scope of the earlier book on *Principles and Methods of Municipal Administration* has been very materially increased by the addition of the important topics of public health, social welfare, and public utilities, the absence of which in the former general treatise constituted a very serious defect.

It may be questioned whether the general title of *Municipal Government and Administration* is justified by the attention devoted in the work to the municipal institutions and practices of countries other than the United States. There are numerous references to England, France, and Germany, but they are extremely brief and certainly not adequate for a work attempting to deal with the government of municipalities in those countries. A more accurate title therefore would probably have been *Municipal Government and Administration in the United States,* with some reference to the principal countries of Europe. However, that is perhaps an unimportant detail and does not in any sense detract from the value of the book as a text in the courses in municipal government ordinarily given in our universities and colleges.

HERMAN G. JAMES.

University of Texas.

HOLCOMBE, A. N. *The Foundation of the Modern Commonwealth.* (New York: Harper and Brothers, 1923. Pp. 491.)

Practically all of the studies in the field of political science by Americans have dealt with descriptive or comparative government, or have gone to the other extreme and treated problems of political thought *in vacuo*. The fact that these same political theories were developed to oppose or defend certain laws or institutions has not deterred American writers from treating them as if they were the product of closet philosophers and would surely perish if exposed to the biting air of controversial politics. Professor Holcombe has, therefore, performed no small service to students of political thought and of contemporary government by treating the fundamental problems of popular government in a realistic, yet philosophical manner.

The central purpose of the work is "to state the problem of government, believing that a fair statement of the problem is a least the beginning of its solution...this book is only an introduction to the study of the science of government." After an introductory survey of the nature and problems of the modern commonwealth, he takes up such problems as church and state, nationalism, the struggle of classes, justice, liberty, and the reign of law. Ever keeping before the reader the central questions involved in each general problem, the author seeks to present everything of value which political thinkers of the past have contributed to their solution. Not only has he given valuable critical estimates of the worth of the contributions of past theorists, but he has also demonstrated a keen insight of his own, an insight that can at least aid us in reaching a conclusion concerning the paths along which a solution of the problems must proceed. However, the author has intentionally kept himself in the background throughout, to the end that he might present a scientific statement of the problems with which he is dealing. The bibliographical notes which follow each chapter and the excellent index add to its usefulness as a text for college classes in government.

B. F. WRIGHT, JR.

University of Texas.

MCDONALD, WILLIAM. *Three Centuries of American Democracy.* (New York: Henry Holt and Company, 1923. Pp. 346.)

The author's purpose in writing this volume is to give the reader who may not have time for extensive reading a knowledge of the "main facts and the formative influences in the growth of the United States as a democratic nation." The limits of the volume necessitate a terse treatment of our history and make impossible the inclusion of any other than the most general information. Except for the final chapter on *Politics and the American Mind*, there is apparently no attempt in presenting a fresh point of view.

The chief point of excellence in the volume is a pleasing literary style and a ability to give brief but apt characterizations of American

politicians and statesmen. Unfortunately the work is marred by several errors of fact and typography. The bibliography, arranged by chapters, presents a limited but well selected list of authorities.

THEODORE G. GRONERT.

University of Arkansas.

HAYES, C. J. H. AND MOON, P. T. *Modern Europe.* (New York: The Macmillan Company, 1923. Pp. xviii, 890.)

Of the making of many books on modern European history there is no end. Nevertheless, the authors of this volume have presented this well covered field from a point of view which is different from that of any comprehensive one volume work in this field. This is evidenced by the brief introduction dealing with the value, unity, and continuity of history, and by the emphasis placed upon the development of social, economic, and political democracy. That democracy is not an end in itself, the authors make plain when they say that "democratic government will be as wise and as beneficent, or as unwise and corrupt as we make it."

Valuable helps of various kinds have been included. The illustrations and maps are well selected and appropriate. At the end of each chapter review questions, special topics, and references to books dealing with the period under discussion are selectively arranged; and to aid in the more effective mastery of the subject-matter of the text and as a guide in other reading, the authors have prepared a pamphlet containing a syllabus and other helps.

WILLIAM STUART.

Texas Women's College.

KOHLSAAT, H. H., *From McKinley to Harding.* (New York: Charles Scribner's Sons, 1923. Pp. 235.)

This is an entertaining little volume of personal recollections of recent presidents of the United States by a successful Chicago newspaper publisher, who has evently enjoyed an intimate acquaintance with many of the most prominent Americans of the last thirty years. The book contains forty-six chapters of four or five pages each, most of them being short articles, which first appeared in the *Saturday Evening Post.*

Mr. Kohlsaat held the important office of "brutal friend" under McKinley, Roosevelt, Taft, Wilson, and Harding. If we are to believe his own statement, he has had a very influential part in the determination of many important policies. The correspondence which he gives indicates that he has been held in esteem by these presidents and other political leaders, and that his advice was welcomed and sometime followed by them. This is, of course, not formal history, but it is a volume which will be diverting to anyone interested in political personalities.

WILLIAM C. GUESS.

Trinity University.

BOWERS, CLAUDE G., *The Party Battles of the Jacksonian Period.* (Boston: Houghton Mifflin Company, 1922. Pp. xix, 480.)

Mr. Bowers has rendered a real service to the general reader and especially to the students in re-creating this important period of American democracy with its social and dramatic character fully delineated. The chapter on *Washington Society of the Thirties* is exceedingly illuminating—a country town situated in a swamp, pregnant with fevers, pneumonia, influenza, and cholera, is graphically pictured as the scene of the flappings of an aristocratic society as well as that of the most dramatic and significant polifical battles in American politics. It was in these days that the masses first gained control of their government.

The famous Jackson-Crawford-Calhoun controversy, as well as the "Peggy" Eaton episode, is analyzed with singular aptitude and clearness; a dispute that ended in Jackson's breaking with Calhoun and championing Van Buren as the heir apparent. The character sketches throughout are as romantic as those of Dumas, yet as truly historical as those of Plutarch; men like Clay, Calhoun, Webster, Crawford, Biddle, Benton, Edward Livingston, and John Marshall are made to appear as real politicians—ambitious, scheming and intriguing. It is thoroughly satisfying in the respect of being a study of practical politics.

It is not to be undstood that the true historical or scientific spirit has been sacrificed by the introduction of these literary and artistic features. It is, on the other hand, a copiously documented treatise, and the quotations, references, and allusions indicate the prodigious amount of work that was necessary to produce this rare combination of the literary and the historical, the artistic and the scholarly.

C. P. PATTERSON.

University of Texas.

Teachers and students alike will welcome the 7th Edition of Lawrence's *Principles of International Law*, (D. C. Heath & Co.) of which Percy H. Winfield, of Trinity College, Cambridge, is the editor. It was no small task to revise the 6th Edition, which appeared in 1913, but the work has been exceptionally well done. With Higgins' 7th Edition of Hall and Roxburgh's 3rd Edition of Oppenheim with which to compete, the defense of the irenic views of the venerated rector of Upton Lovell was not easy, nor, in some instances, possible. Some assistance was rendered by the publication in 1918 of Lawrence's *Society of Nations*, the best portions of which have been included in the present revision. It has been the new editor's main task to reconcile the decisions of British Prize Courts with the more liberal views held by the old master—a task to be approached with trepidation. Winfield has borrowed heavily from the latest cases and the best authorities, such as Garner's *International Law and the World War* (1920) and Fauchille's *Droit International Public* (1921) to show the changes

in the law produced by the World War. By making these deeper analyses available to the general reader, the editor has ably acquitted himself and rendered a service of the highest order to students of the Law of Nations. As regards omissions, it is somewhat surprising to note that no notice has been taken of the effect of the League of Nations on the general import of the doctrines of neutrality or intervention, and that mandates and colonial protectorates are not considered as being in any way related.

M. W. G.

In issuing their interesting compilation of *Representative Modern Constitutions* (Los Angeles, Times-Mirror Press, 1923), Drs. Martin and George of the University of California, Southern Branch, have performed a considerable service to students of comparative government. The authors have gathered together the important constitutional documents of France, Switzerland, Italy, Germany, Czechoslovakia, Mexico, Canada, Japan, and Russia, in a handbook thoroughly suitable for the use of beginning classes of government. Although the authors make no extended endeavor to supply the living spirit that animates these documents, they have accompanied each by a pungent prefatory note that gives the salient features of each country's constitutional development. The inclusion of Mexico, Canada, and Japan is significant and worth while, as such documents are not readily accessible to the average student. Except for the omission of Chapter IV of the Swiss Constitution, and for the regrettable fact that the Constitution of the United States of Russia came into being too late to be included, nothing is wanting to make the book a volume both authoritative and illuminating to all readers.

M. W. G.

Taraknath Das in *India in World Politics* (B. W. Huebsch, 1923), has struck British imperialism a hard blow. He shows that British foreign policy for the last half century has been based on the idea of strengthening England's grip on India. He points out that, but for the British control of India, there would have been no need for their Suez Canal, their protectorates of Egypt, Palestine, Arabia, and Persia, the Anglo-Japanese alliance, and the big navy. He concludes that India, is, therefore, the heart and core of British imperialism. Since imperialism is subversive of the peace of the world, he contends that the independence of India should be the chief concern of mankind. He thinks that British diplomacy is outwitting the world and that a few more alliances will complete their net. These he regards as a great menace to the world in general and Asia and India in particular. Mr. Das has made a very vivid and dramatic plea for his country, but without pointing out British misrule or India's ability to govern herself. The book is a piece of anti-British propaganda that partakes of the spirit of the Gandhi movement.

C. P. P.

Mark Sullivan's *the Great Adventure at Washington* (Doubleday, Page and Company, 1922,) is the typically journalistic product which, as he admits, (p. VII) makes "no pretense to exhaustiveness or authoritativeness, or even to absolute accuracy." It does escape the insipidity of the formal historian. It has a dramatic and vivid style that makes it thoroughly popular rather than a scientifically documented work. It is a sympathitic account of the Washington Conference, which he regarded as the first step in bringing into existence the Harding Association of Nations, which as yet has not made its debut. It is too optimistic over the work of the Conference, and practically becomes in the end a party handbook.

C. P. P.

Our Republic by Foreman (Century, 1922), is possibly the most satisfactory single volume text for a college course in American history yet published. It has excellent proportions, reducing the space usually given to wars, and enlarging upon the West and the South. Out of more than 800 pages, less than 90 are given to the period prior to 1783. This period is covered more critically than is usually the case, and, consequently, with greater fairness to the mother country. The picture of plantation life and of slavery which is given in this book is far better than that found in the ordinary text book on American history. The social side of history also comes in for brief but effective discussion. On the whole the work is well done but it might be improved by the addition of pedagogical features, as suggestive questions, topics, critical notes, and bibliographies.

C. P. P.

Impressions of an Average Juryman by Robert Stewart Sutliffe (Hubert H. Foster, 1922,) is a sketcky account of the reactions of a juryman to the various phases of jury service. The chief value of this publication is that it shows the indifference and lack of responsibility that the jury manifests in its participation in the otherwise solemn process of administration of justice. The author states (p. 19) that jurors lightly consider their oaths, the law, and the evidence, and decide matters "in a common sense way." It is really a psychological study of the practical problems connected with jury service and is rather illuminating.

C. P. P.

Ferdinand Schevill in his *History of the Balkan Peninsula* (Harcourt, Brace & Co., 1922,) has given a rather encyclopedic account of the Near Eest problem. The author set himself a difficult task when he proposed to guide the reader through the haze and mist of the Balkan puzzle from the regime of Alexander the Great to that of Mustapha Kemal Pasha, who has recreated the Ottoman Empire despite the fact that the author pronounced it dead in 1922. The

book is too detailed for the general reader, but would serve admirably for a text in an advanced course on the history of the Near East.

C. P. P.

The Macmillan Company published in July of this year a volume entitled *Turkey, The Great Powers, and the Bagdad Railway: A Study in Imperialism* by Edward Meade Earle. The author puts in one volume of twelve chapters the whole story of conflicting imperialistic schemes in Asiatic Turkey beginning with the first German efforts three decades ago and ending with the second Lausanne Conference and the granting of the Chester concession. He takes care to show the relation of these designs to the tangled skein off European and world-wide diplomacy. The book is an authentic, impartial, and readable account of the latest of those great interstate dramas that have been played from time to time during the past four years in that historic region stretching from Constantinople to the Persian Gulf.

C. T.

All of the essays contained in this posthumous volume, *Parties and Party Leaders* (Marshall Jones, 1923,) by the late Professor Anson D. Morse of Amherst College, have appeared in print before. With the exception of two essays on economic and commercial questions, they deal with problems in the theory, history and leadership of American parties. Among the special topics treated are the natural history of party, the political theory of John Adams, Alexander Hamilton, Andrew Jackson, and the two great parties. Any summary or evaluation of the work is impossible because of the diversity of subject matter, and because of the uneven value of the essays to the present day student of politics. Professor Morse's theory of the party system, for example, is both interesting and suggestive; it is as valuable today as it was in 1891, but in many cases recent research has revealed material not available when these papers were prepared. However, the book is decidedly worth while to those interested in the field with which it deals, for the conclusions in all cases indicate no little investigation and careful thought. The introduction by Mr. Morrow contains one of the best surveys of political parties and party sentiment yet written.

That European and American students of comparative political thought have erred in failing to take account of the material in this field produced by the Orientals is made evident by Professor U. Ghoshal in his *History of Hindu Political Theories* (Oxford University Press, American Branch, 1923). It is of course true that the Hindus have been preeminantly religious in their thought and that their political theory has been strongly colored by this fact. This much, however, may be said of the medieval period in western Europe and no one would think of passing by the political thought of that very

important period simply because of its theological nature. Professor Ghoshal's book seems to give a thorough account of Hindu thought to the seventeenth century. It is to be hoped that he will, in a subsequent work, bring his study down to the present time in order that the effect of English and French colonization and control may be made available, and the basis for comparison of modern Hindu theories of the state with those of western peoples be provided.

Professor J. E. Harley of the University of Southern California has provided a useful source book on present day international law and relations for college classes. His *Selected Documents and Materials* (Times Mirror Press, 1923,) deals primarily with the texts of documents pertaining to the League of Nations, the Permanent Court of International Justice, and the Washington Conference on the Limitation of Armament. These selections are preceded by five chapters which contain a brief summary of certain of the more important developments in the field of international cooperation during the nineteenth and twentieth centuries, and which deal in more thorough fashion with the League of Nations and the Washington Conference.